BRIEF FOR APPELLANTS

20071

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1902.

No. 174.

CLINTON B. WISER, C. M. FIELD, JOHN A. KERR, JAMES A. FERGUSON, DORSEY NEVILLE, MARY M. HEATH, JOHN J. MILLER, HENRY L. MUGSFORD, WILLIAM J. FOSTER, EDGAR G. MILLER, L. F. HOIRNE, SIDNEY G. LAW, EDWARD M. SMITH, HARPER M. SMITH, BENJAMIN GOODMAN, LESTER M. CROUCH, JOHN B. CLUTE, KATIE T. COURTNEY, H. S. ANDERS, AND CECIL QUENTIN, *Appellants,*

vs.

JOHN LAWLER, ED. W. WELLS, SEVEN STARS GOLD MINING COMPANY, INDUSTRIAL MINING & GUARANTY COMPANY, AND JOHN GRIFFIN, RECEIVER, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLANTS.

MAY IT PLEASE THIS HONORABLE COURT:

STATEMENT OF THE CASE.

I.

NATURE OF THE SUIT AND PROCEEDINGS IN THE DISTRICT COURT AND SUPREME COURT OF ARIZONA.

This is an appeal from a decree of the Supreme Court of Arizona affirming a decree of the District Court of

Yavapai County, Arizona, dismissing, for want of equity, a complaint filed by appellants. This complaint was filed by appellants, for themselves and for all others in like estate, against John Lawler and Ed. W. Wells, principal defendants, and Seven Stars Gold Mining Company, Industrial Mining & Guaranty Company, and John Griffin, receiver of the Seven Stars Gold Mining Company and Industrial Mining & Guaranty Company. Appellants had purchased stock in the Seven Stars Gold Mining Company, relying upon the statements appearing in a prospectus and map of that company, representing it to be the owner of a group of mines situate in Yavapai County, Arizona. John Lawler and Ed. W. Wells were the vendors of those mines, and had made a contract for their conveyance to Chas. Cowland or his assigns, in the form of an escrow agreement.

The relief demanded by the suit, as set forth in the amended prayer, appears at page 191 of the transcript. It is alternative in character and as follows:

First. That it be adjudged and decreed that Lawler and Wells, by their acts and silence shown in the bill of complaint, are estopped from insisting on the terms of a certain escrow agreement of May 12, 1892, and from asserting that the title of the mining property involved in the suit was not vested in the Seven Stars Gold Mining Company in which the plaintiffs had purchased their stock; or

Second. That plaintiffs and others in like estate be granted a money decree against Lawler and Wells for the aggregate amount of money paid by plaintiffs and others in like estate for stock in the Seven Stars Gold Mining Company upon the representations in the prospectus and map mentioned in the complaint, whereupon the title to

the mining property should be confirmed in Lawler and Wells.

The original complaint was filed March 9, 1895. After taking a number of depositions plaintiffs amended their complaint to conform to the proof. The complaint as amended appears in the transcript, pages 57 to 71, excepting the amended prayer, which appears at page 191.

To the complaint as amended Lawler and Wells filed special and general demurrers, general and special denials and a plea of estoppel in the nature of an answer. (Tr., 71-98.) Receiver Griffin filed a short answer, admitting all the averments. (Trans., 98.) Seven Stars Gold Mining Company and the Industrial Mining & Guaranty Company were adjudged in defaullt for want of answer. (Trans., 226.)

September 27, 1897, the cause came on for hearing upon the amended bill and the pleadings aforesaid before Honorable Hiram C. Truesdale, presiding judge. (Trans., 226.) After hearing the equities were adjudged in favor of the plaintiffs and an interlocutory decree for relief and accounting with Lawler and Wells was entered. (Trans., 229.) This interlocutory decree, in brief, adjudged (Trans., 230) that the rights of Lawler and Wells, the vendors of the mines, were subject to the rights and equities of each and every stockholder of the Seven Stars Gold Mining Company who had, in good faith, bought his stock induced by the representations made in the prospectus and map circulated to promote the sale of the stock. The cause was then referred to a master to ascertain and report to the court the number of shares of the Seven Stars Gold Mining Company subscribed and paid for and the names of the subscribers. (Trans., 230.) The order of reference likewise requested

the master to ascertain the amount of money paid to Lawler and Wells on account of the purchase price of the property under the contract in escrow.

Pending the hearing before the master, Judge Truesdale died. The cause was then assigned to Honorable Webster Street. Upon the special master concluding his report, objections were interposed by Lawler and Wells and were overruled. (Trans., 141.) These objections, treated as exceptions to the report, were considered and overruled by Judge Street. (Trans., 164.)

July 11, 1898, Judge Street entered a final decree "to carry into effect the adjudications and decree" of Judge Truesdale. This final decree adjudged that the stockholders of the Seven Stars Gold Mining Company, including appellants, and all others in like estate, "have a lien upon the said mines and mining property prior and superior to any right, title, interest or equity in or to said property, property rights or appurtenances of said defendants, John Lawler, Ed. W. Wells, Industrial Mining & Guaranty Company, Seven Stars Gold Mining Company and John Griffin, receiver of the Industrial Mining & Guaranty Company and of the Seven Stars Gold Mining Company, for the amount and in the sum of $180,139.82," and the property was ordered sold in satisfaction of this lien, the surplus, if any, to be paid to Lawler and Wells. (Trans., 165.)

His Honor Judge Truesdale heard the cause in the District Court. He was the only judge who saw the witnesses and heard them testify. Before him the cause was thoroughly argued. His conclusions of fact and law were fully stated at the time of the entry of the interlocutory decree and appear in the transcript, pages 148 to 163.

Upon the entry of the final decree, in accordance with the interlocutory decree of Judge Truesdale, Lawler and Wells filed a motion for a new trial. (Trans., 168.) Thereafter, and upon this motion, Judge Street set aside the decree which he had entered in accordance with the interlocutory decree of Judge Truesdale and granted a new trial. (Trans., 237.)

Thereupon and on November 1, 1898, the case was resubmitted to Judge Street upon the pleadings and upon the evidence that had been taken on the hearing before Judge Truesdale and upon the arguments made on the motion for new trial, and thereupon and on said November 1, 1898, Judge Street held that plaintiffs were entitled to no relief and ordered the dismissal of the complaint. (Trans., 238.) Motion for a new trial was made by plaintiffs and denied *pro forma*. (Trans., 238.) Thereupon an appeal was prayed and perfected to the Supreme Court of Arizona. (Trans., 239.) The Supreme Court affirmed the decree of dismissal. (Trans., 308.) Plaintiffs filed a petition for rehearing, which was denied. This petition appears in the transcript, pages 292 to 300. From this decree of affirmance the present appeal is prosecuted.

At the time of the entry of the interlocutory decree of September 21, 1897, by Judge Truesdale, he made and entered of record his findings of fact, which appear in the transcript, pages 148 to 156. At the time of granting the new trial and thereon dismissing the complaint, Judge Street signed and filed in the cause findings of fact, *which had been drafted and submitted by counsel for defendants.* (Trans., 192-207.) He rejected all findings made by his predecessor, who had heard the cause and all findings submitted by counsel for plaintiffs. (Trans., 207-221.)

At the time of the submission of the cause in the Supreme Court plaintiffs filed a motion for a statement of facts, together with a proposed statement of facts. (Trans., 243-259.) This statement not only states facts proved on the trial, but also refers to the evidence establishing each fact.

The Supreme Court accepted, approved and filed as its findings of fact the findings of fact made by Judge Street in the District Court (Trans., 314), adding, however, three additional findings, numbered 26, 27 and 28. (Trans., 321.)

The evidence does not appear in the transcript of the record, no error being assigned as to rulings on the admission or rejection of evidence. The transcript is in accordance with the Act of Congress of April 7, 1874, c. 80, entitled "An Act concerning the practice in territorial courts and appeals therefrom," 18 Stat., 27, which provides:

> "That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed, or may hereafter prescribe; provided, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree," etc.

II.

THE FACTS OUT OF WHICH THE LITIGATION AROSE.

In ascertaining the facts of this case, we think it proper that this court consider:

(1) Admissions of appellees in the pleadings and motion for new trial filed by them in the District Court. (Trans., 168.)

(2) A stipulation made and filed by the parties of certain facts. (Trans., 106.)

(3) The report of Chas. P. Hicks, special master, which was filed in the cause and became a part of the record. (Trans., 107.)

(4) Fndings of fact made by the Supreme Court of Arizona. (Trans., 314.)

THE MATERIAL FACTS ARE:

On and prior to May 12, 1892, appellees, John Lawler and Ed W. Wells, both of Prescott, Yavapai County, Arizona, were the owners of the mines described in the bill of complaint known as the Hillsdale group of mines. Lawler owned an undivided three-fourths interest and Wells an undivided one-fourth interest therein. (Find. 1, Trans., 314.) Their title was of record in Yavapai County, Arizona, in which the mines were located. Before May 12, 1892, Lawler and Wells had been negotiating the sale of these mines to H. H. Warner of New York City. These negotiations resulted in a contract of purchase executed on May 12, 1892, between Lawler and Wells, as vendors and Chas. Cowland as vendee. (Find. 3, Trans., 314.)

Warner suggested the name of Cowland as the apparent purchaser, because he intended to promote the property and did not wish to appear in the contract of purchase. As a matter of fact Warner was the sole party in interest and guaranteed payment of the purchase price. (Finding 4, Trans., 316.) Contemporaneous with the execution of the contract of purchase was executed a warranty deed reciting full payment of the purchase price, conveying the mining property to Cowland (Trans., 315). The contract of purchase and deed were put in escrow in the Prescott National Bank at Prescott, Arizona. (Trans., 315.) This contract of purchase provided, among other things (Trans., 53):

(1) That the deed to the mining property from John Lawler and Ed W. Wells to Chas. Cowland, dated May 12, 1892, is deposited in escrow with the Bank of Arizona and be held and delivered by said bank upon the payment of $450,000, $20,000 at the date of the execution of the contract, $80,000 thirty days thereafter, $100,000, on or before November 12, 1892, $125,000 on or before May 12, 1893, and $125,000 on or before November 12, 1893, all bearing interest at ten per cent.

(2) That Cowland have the right to enter immediately into full possession and occupancy of the mining property and to work and operate the same.

(3) This possession of Cowland and his assigns by express terms of the agreement was to remain in law the possession of Lawler and Wells; that is to say, while Lawler and Wells gave exclusive and public possession to Cowland with apparent unrestricted ownership, yet as between Cowland and Lawler and Wells the possession of Cowland and his assigns should be treated in law as the possession of Lawler and Wells.

(4) All the proceeds of the operation of the property by Cowland and his assigns until the full purchase price was paid should belong to Lawler and Wells.

(5) In case of a failure to pay any installment of the purchase price, all payments theretofore made should be forfeited to Lawler and Wells and the property with all improvements and all ores taken therefrom should revert to Lawler and Wells.

(6) Lawler and Wells should in no way interfere with the use, working and operation of the property by Cowland and his assigns.

The contract was assignable by Cowland without the consent of Lawler and Wells.

Upon the execution of this contract and deed and the placing of the same in the Bank of Arizona in escrow Warner paid Lawler and Wells $20,000 in cash and on May 24, 1892, twelve days thereafter, Warner paid to Lawler and Wells $31,000.

About May 15, 1892, Lawler, representing himself and Wells, placed Warner in possession of the mining property (Finding 7, Trans., 316), and Warner and his assigns, as hereinafter more fully shown, remained in exclusive, open and public possession of this mining property until the enforcement of the forfeiture by Lawler and Wells on account of the non-payment of accrued installments of the purchase price on September 10, 1893. (Finding 32, Trans., 322.) During this entire period of open and public possession by Cowland and his assigns, the deed and escrow agreement remained in the possession of the Prescott National Bank, and were never recorded or made known to appellants or the public. (Find. 3, Trans., 315; Find. 42, Trans., 323.) While thus in possession of the prop-

erty under the Cowland contract and on June 14, 1892, Warner incorporated under the laws of New Jersey the Industrial Mining & Guaranty Company, an auxiliary corporation to aid in the promotion of these mines and other enterprises, as hereafter shown. (Fnding 8, Trans., 316.) On June 15th, Cowland assigned to this Industrial Mining & Guaranty Company the escrow agreement, and on that day the possession of the mines was transferred to the Industrial Mining &Guaranty Company. (Finding 9. Trans., 317,) That company operated the mines until October 1, 1892, when possession was transferred to the Seven Stars Gold Mining Company. (Finding 13, Trans., 318.)

This last named company was incorporated in New Jersey on August 15, 1892. (Find. 11, Trans., 317.) The purpose of this incorporation was to take the title to this mining property and to operate the mines and to offer its stock based on the mining property for value to public subscription. During all the time that the stock of the Seven Stars Gold Mining Company was being offered to the public for subscription as hereinafter shown, that company was in exclusive, open and public possession and operation of the mining properties in controversy. (Find. 30, Trans., 321.) It conducted the operations of the mines as apparent owner. It opened books, purchased supplies, employed labor, sold ore, collected the proceeds of the ore, and otherwise dealt with the public in the same manner as the actual owner of the property.

All this was with the full knowledge and acquiescence of Lawler and Wells.

While it was so in possession and operating this mining property and thus clothed with the appearance of

prosperous ownership, stock of the Seven Stars Gold Mining Company was offered and sold to various persons throughout the country, including appellants.

The scheme of promotion was as follows: The sale of the stock was made through the Industrial Mining & Guaranty Company as the agent of the Seven Stars Gold Mining Company. (Find. 40, Trans., 323.) Warner controlled both companies.

June 15, 1892, as stated above, Cowland assigned all his rights under the escrow contract to the Industrial Mining & Guaranty Company (Finding 9, Trans., 317), the Industrial Mining & Guaranty Company agreeing to carry out all covenants of the contract to be performed by Cowland.

On September 10, 1892 (Find. 12, Trans., 318), the Board of Directors of the Industrial Company adopted a resolution offering to convey to the Seven Stars Gold Mining Company all its interest in the mines in question, upon that company showing that it had placed $200,000 of working capital in its treasury, and upon the Industrial Mining & Guaranty Company receiving $2,800,000 in cash *or stock* of the Seven Stars Gold Mining Company. The stock of the Seven Stars Gold Mining Company was fixed at $3,000,000, divided into 600,000 shares of $5 each. (See) prospectus, Trans., 18.) Two hundred thousand shares were made a guaranteed stock upon which dividends at the rate of fifteen per cent. were guaranteed for five years. Upon the passage of the resolution above mentioned, this 200,00 shares of guaranteed stock was generally offered for public subscription. It is clear that the real purpose of Warner, studiously concealed from the public as hereinafter shown, was to realize from the

sale of this guaranteed stock sufficient moneys to enable him to pay Lawler and Wells for the property and at the same time to meet the guaranty of dividends for five years. By selling 200,000 shares of stock at $5 a share Warner would realize $1,000,000. Out of this he could pay Lawler and Wells the $400,000 still due on the property and, with what could reasonably be expected from the operation of the mine, pay the fifteen per cent. dividends for five years, and still have $2,000,000 of stock as a profit. To this scheme all the acts herein shown were subsidiary, and in its success, so far as the raising of $400,000 to meet the purchase price was concerned, it is evident that Lawler and Wells were greatly interested. To carry out this scheme and effect the sale of the stock, the Industrial Mining & Guaranty Co., which, as we have seen, under the resolution of September 10, 1892, was to receive $2,800,000 of the stock of the Seven Stars Gold Mining Company, prepared two very elaborate prospectuses, one for America and the other for England. (Find. 14, 15, 16, Trans., 318.) These prospectuses were worded in the most attractive way to show the great merits and value of this group of mines of the Seven Stars Gold Mining Company, and to demonstrate the great desirability of an investment in the stock representing such properties. (Prospectuses, Trans., 18, 29.) Three hundred thousand copies of the American prospectus, accompanied by a map of the property and applications for subscription to stock, were circulated by mail throughout the United States. This circulation began on September 20, 1892, although the prospectus was dated September 24. (Finding 14, Trans., 318.) Among those who received copies of the prospectus, map and blank subscriptions were appellants. Upon the faith of their statements

they severally purchased various amounts of stock in the Seven Stars Gold Mining Company. All of appellants, excepting Wiser, testified, as found by the Supreme Court of Arizona (Find. 42, Trans., 323), that they had received the prospectus and map and *believed from reading the same that the Seven Stars Gold Mining Company owned the mines and property therein mentioned, and by such belief were induced to buy the stock in the company.* None of appellants had any knowledge whatsoever of the escrow agreement or warranty deed in the possession of the Bank of Arizona, or of Charles Cowland in the assignment made by him to the Industrial Company. The public had no information other than that conveyed by the prospectus. Circulated with the prospectus were blank forms for application for shares (Trans., 28), which expressly recited that subscriptions are made "upon the terms and conditions of the prospectus." Upon these blanks appellants applied for their stock. Stock was sold throughout the country to about 500 persons. (Finding 42, Trans., 323.) Appellants Anders and Quentin reside at London and purchased stock on the faith of the English prospectus.

Upon the American prospectus stock was sold and the proceeds of such sale received by the Industrial Mining & Guaranty Company in the amount of $131,859.52. Upon the English prospectus stock was sold and paid for in the sum of $125,852.33. $2533,128.05 was the aggregate amount of money received from the sale of the stock of the Seven Stars Gold Mining Company through this scheme of public subscription, and the entire amount received for stock of that company so far as this record shows.

The Prospectuses.

Both the American and English prospectuses and maps as thus distributed were manifestly false in various material and important particulars. They abound not only with statements calculated to mislead but with literal untruths. Nowhere in either prospectus is there any mention or intimation of any interest or title of Lawler and Wells in or to the mines in the possession of the Seven Stars Gold Mining Company, nor any mention of the escrow agreement, or any condition attached to the title. The prospectuses or maps do not mention that any person whatsoever other than that company had any interest in the mines. On the contrary, as each prospectus is examined, it will be seen that its perusal could lead to but one conclusion and that is that the Seven Stars Gold Mining Company was the owner of the mining property, upon the value of which the stock offered for public subscription was based. The prospectus and maps were prepared to sell the stock and to do so they represented to the proposed investor that the company owned the property which the prospectuses were offering to the public for investment. At the same time, it will be borne in mind that while these prospectuses were being circulated during the months of October, November and December, 1892, the Seven Stars Gold Mining Company was in full possession and operation of the mining property. This fact of open, public and exclusive possession is shown by the prospectus.

The American prospectus (Trans., 18) is ushered in by the statement that guaranteed quarterly dividends, etc., "are the novel features offered *investors in an already producing gold mine in Arizona,* one of the great-

est properties in this country." Thus the attention of the would-be buyer of stock was attracted at the outset to the great property in which, by purchasing stock, he could secure an interest. He was invited to invest in property which is made the basis of this prospectus and upon which the stock solely and exclusively rested for value. Then follows the statement that the purchasers of stock *would participate in the full earnings of the company*. Yet under the contract of escrow between Lawler and Wells and Cowland in the Bank of Arizona, Lawler and Wells pending such contract were to receive the entire gross earnings. (Trans., 55.) This is followed with the assertion: "This company presents an unusual opportunity for investors to acquire *an interest in one of the richest and most extensive gold mines in the world.*" And then it is stated that because of the extraordinary value of the property H. H. Warner had connected himself with the enterprise. The prospectus then goes on to describe the property, its magnitude, the amount of ore in sight, the possibility of further discovery, the five stamp mill on the property. "The output of the mine is at present about $1,000 a day. With 20 additional stamps now in course of construction, the output should reach $5,000 per day." It is not stated that any one excepting the company had an interest in this output. *Throughout the property is described as the property of the Seven Stars Gold Mining Company.*

Further reference to the property follows: "It is estimated that an expenditure of $100,000 will disclose additional ore to the value of $3,000,000." "Upon the completion of the new mill—to say nothing of the additional mills which it is proposed to erect—the property should earn very large dividends for many years."

The public is next told how the mine is being worked by the company, the nature of the vein, environment, etc. Reference is then made to the map which accompanies the prospectus. It is said that the mining property covers 210 acres and connected with it are dam sites, water sites, timber claims and town sites." Very prominently stated is the most material and important fact in this connection. Under the clause marked "Title"—the clause to which the purchaser would naturally look if the idea of questioning the ownership in the company that was offering the property ever entered his mind—it is said: "The titles are unquestionable, the Seven Stars, Hillside, Happy Jack and other mines *being held* under United States patent." Elsewhere the prospectus informed the purchaser that the mines were *then held* by the Seven Stars Company. Taking this statement in connection with the rest of the prospectus, it is a plain, unqualified representation that the mines were owned by the Seven Stars Gold Mining Company. This representation is confirmed by other clauses, which refer to the assay office, etc., etc., belonging to the company, with a further statement that *"the company owns* valuable timber claims covering 180 acres."

Under the clause marked "Objects," wherein was stated the purpose of the organization of the company, it is said that it was formed to acquire the property on October 1, 1892. Under the Cowland contract the deed was to remain in escrow until November 12, 1893, and until that time the *gross* earnings were to belong to Lawler and Wells. The prospectuses were circulated and practically all the stock sold *after* October 1st, when it was stated that the company, under its plan of formation, would acquire the property. The books for subscription

were not opened until October 6, 1892. (Trans., 19.) The prospectus refers to the map. The map pictures the mines and contains the inscription (Trans., 24): "Map of the Group of Mines *belonging to the Seven Stars Gold Mining Company.*"

After asserting in the prospectus and on the map in several forms ownership of the mines by the Seven Stars Gold Mining Company, the public is advised by other express statements in the prospectus, that the funds to be raised by public subscription for stock were to be used as working capital and to develop and extend the operations at the mines. Thus it was made clear from the prospectus that no part of these funds would be needed to pay for the mines which already belonged to the company.

The prospectus asserts: "It is estimated that an expenditure of $100,000 will disclose additional ore to the value of $3,000,000." It is further stated that a twenty stamp mill is in course of construction, "to say nothing of the additional mills which it is proposed to erect." (Trans., 20.) The prospectus speaking of recent developments, that "another tunnel can be run 75 feet below the present lowest level," etc., "no limit is yet known to the extent of this great mass of ore," and a report attached to this prospectus states that "the property was in the infancy of its development." (Trans., 23.)

Not a word is said as to unpaid purchase price.

A reading of the entire prospectus leads to but one conclusion, namely: Two hundred thousand shares of stock were being sold to raise funds, not to pay for the property, but to further equip and develop it. It was already the property of the company without adverse claim or condition, is the meaning of the prospectus.

If, in the face of the representations of the ownership, the matter of how the property had been paid for occurred to any stockholder, the prospectus told him that the entire capital of the Seven Stars Gold Mining Company was $3,000,000, and but $1,000,000 was offered for sale. The natural inference would be that the other $2,000,000 or some portion thereof had acquired and paid for this great property.

These were representations held out to the public, to the full knowledge of Lawler and Wells as hereinafter shown. Secretly, and as known to Lawler and Wells and Warner and no other persons, Warner and his company had in fact no title whatsoever to the mines and could acquire such title only by getting the public to pay the price by buying his stock, which at the time offered to the public was dependent for all value upon hopes that $400,000 of it would be sold.

The English prospectus contains practically the same representations as to the property, its possession and ownership, as the American prospectus, with the additional unqualified assertion. (Trans., 30.) "The mines *owned by the company* are situated in the Eureka Mining District, Yavapai County, Arizona, 50 miles from Prescott, on the Arizona Central Railway. * * * (Trans., 31.) *The title is indefeasible,* being United States patent, to five claims, together with several locations as easements."

The English prospectus likewise wholly omits mention of the escrow agreement or of any adverse interest or condition attached to title.

The same map was circulated with both American and English prospectuses.

It is found as a fact that a great number of persons

were deceived and drawn into the purchase of shares by the facts misstated and concealed. (Find. 42, Trans., 323.)

These prospectuses and maps were prepared with the aid of Lawler and Wells. Lawler and Wells furnished substantially all the data used in the preparation of the prospectus. This data included copy of what was known as the Blauvelt report; also the Blauvelt map, which was the map afterwards circulated with the prospectus, copies of smelter and milling returns of ores as well as original smelter and milling returns. (Finding 71, Trans., 319; Finding 43b, Trans., 324.)

It is admitted in the motion for new trial by appellees (Trans., 185, subhead E) that the ore and smelter returns which appear in the prospectuses were delivered by Lawler and Wells to Warner. In said motion for new trial at Trans., 187, the same admission is made in effect as follows: "That there was no evidence tending to show that any proposed stock purchaser or stockholder at the time he purchased stock of the Seven Stars Company, knew that the Blauvelt maps or smelter's reports had been delivered by Lawler and Wells to Richard or the guaranty company, or of Lawler's visit to New York in September, 1892, and the transactions there occurring." John Lawler, one of appellees, was in New York between August 30, 1892, and September 3, 1892, while the prospectuses were being prepared and in the very office in which the work was being done.

He "there became aware that the American prospectus was being prepared for circulation for the purpose of promoting the sale of the stock of the Seven Stars Gold Mining Company, and that the facts and state-

ments contained in the Blauvelt report and map and copies of smelter's returns hereinbefore mentioned, were being used as a basis of the description of the Hillside group of mines to be contained in said proposed American prospectus." (Finding 20, Trans., 320.) Ed W. Wells, the other appellee, was likewise in New York during the time this prospectus was being prepared. (Finding 18, Trans., 319.)

After Lawler returned from New York and on September 28, 1892, at the request of Warner, he sent to Warner, by express, the originals of the smelter and milling returns, copies of which are attached to the prospectuses. (Finding 17, Trans., 319.)

The knowledge of Lawler and Wells of the circulation of the prospectuses and maps is established by the express findings of the Supreme Court of Arizona. (Finding 37, Trans., 322; Finding 43, Trans., 324.) In addition to these findings of the Supreme Court of Arizona it is admitted of record by appellees that Lawler and Wells received copies of the prospectus. Judge Truesdale, who heard the cause, expressly found that Lawler and Wells had received copies of the prospectus (Trans., 152), and Lawler and Wells in their motion for new trial, which was filed after this finding made by Judge Truesdale, admit the finding, but say it was immaterial. They say (Trans., 184): "Because the evidence shows that no one or more of the stockholders *knew anything about the* delivery of the Blauvelt maps, ore and smelter returns, or the visit of Lawler to New York, and the transactions there occurring, or the extensions of said Cowland contract, *or of the receipt by Lawler and Wells or the Bank of Arizona of any prospectus, or their knowledge of the distribution of said*

prospectus." The Bank of Arizona, at Prescott, where Lawler and Wells resided, was their agent under the Cowland contract. It was to receive the payments for Lawler and Wells, credit payment, receive the proceeds of ore and upon full compliance with the contract, deliver the deed.

Judge Truesdale expressly found that a large number of these prospectuses were sent to the Bank of Arizona at Prescott, some of which were sent voluntarily by parties in New York, while others were sent afterwards upon the written request of one Hazeltine, who acted under instructions from the cashier of said bank. (Trans., 163.) This finding of Judge Truesdale is made an admitted fact of record by the statement of appellees in their motion for new trial. (Trans., 182L.)

The Supreme Court expressly finds (Finding 27, Trans., 321) that before July 25, 1893, Lawler had personal knowledge that persons *were being* induced orally to purchase stock in the Seven Stars Gold Mining Company by representations as to the merits of the mining property in question. The Supreme Court does not fix the date when Lawler acquired this knowledge, but it must have been acquired while the sale of the stock was being advertised and promoted as above shown.

Numerous other facts expressly admitted of record by appellees and found by the Supreme Court of Arizona establish beyond controversy that both Lawler and Wells on October 1, 1892, knew of the purpose of Warner to incorporate the Seven Stars Gold Mining Company, and on the basis of their mines offer its stock for sale to the public and by so doing realize the moneys with which to meet the payments accruing under the Cowland contract, and likewise their full knowledge of the distribu-

tion of the prospectuses and maps throughout the United States and England. It is expressly found that both Lawler and Wells knew at the time of the negotiation for the purchase of the property, in May, 1892, that it was the purpose of Warner to incorporate a company to take the title and operate the mines. (Finding 6, Trans., 316.)

The established facts as to knowledge of Lawler and Wells, and their contributions to the prospectus are confirmed by these further findings (Trans., 324, Finding 43):

"That the subscribers to the stock of the Seven Stars Gold Mining Company did not at the time of their individual subscriptions to, or at the time of their several payments for said stock, *have any knowledge or notice of any of the following matters:*

(a) That *Lawler and Wells* on May 12, 1892, *knew* that H. H. Warner proposed to form a corporation to operate said group of mines and eventually take the title thereto, as in finding 6 herein set forth.

(b) That said defendants had furnished the Blauvelt report and map, or the copies of and original smelter's returns as herein mentioned, or that the same were being, or had been, used as data for said prospectus, and the maps distributed therewith.

(c) That John Lawler and Ed W. Wells had visited the offices of the Industrial and Mining Guaranty Company, in New York, in August and September, 1892, or of any matter or thing occurring thereat; or,

(d) That *said defendants knew that said prospectuses and maps were being distributed.*"

Lawler and Wells knew of the incorporation of the

Seven Stars Gold Mining Company with a capital of $3,000,000, and that the name of the company was taken from one of the mines which they had sold, that is, Seven Stars, and that the company was incorporated to float their mining property; they knew of the circulation of the prospectuses broadcast throughout the United States and England and that such circulation was for the purpose of selling stock based entirely for its value upon their property; they knew that while in these prospectuses no mention was made of the escrow agreement or of any interest in the property held by themselves, or of any unpaid purchase price, that in fact it was through the sale of stock that Warner was endeavoring to raise the money with which to pay them for the property; they knew that on October 1st the Seven Stars Gold Mining Company entered into possession of the mines and openly and as apparent owner continued such operation during the months that the prospectus was circulated; they knew that the prospectus stated to proposed purchasers of stock that the proceeds of the sale of stock were to be used in the development of the mines, the building of additional stamp mill and the purchase of machinery and extension of the operation of the company; they knew that while the prospectus expressly stated that the purchasers of stock were to participate in the full earnings of the company, yet under the Cowland contract they were to receive for a long period the entire gross earnings.

Lawler and Wells never objected to or protested against the circulation of the prospectuses and maps, or any acts of Warner or the Industrial Mining & Guaranty Company. They never attempted in any way to make known their rights or interest in or to the prop-

erty. The Supreme Court of Arizona expressly finds (Finding 38, Trans., 322):

> "That the defendants, John Lawler and Ed W. Wells, or either of them or any person in their or either of their behalf, did not at any time protest against the presentation or circulation of the prospectuses, maps, and applications for subscriptions to stock herein mentioned, and they did not at any time or at all attempt in any way to give any notice of their rights in the Hillside group of mines to any of the plaintiffs or purchasers of the stock of the Seven Stars Gold Mining Company, except as such notice might be imputed to the said plaintiffs and stockholders through and by virtue of the recorded title in said defendants of the property in controversy, as in finding 1 herein set out."

Thus for nearly a year, while the Seven Stars Gold Mining Company was in possession of the mines and claiming their ownership, and innocent persons were throughout the country parting with their money upon the appearance and faith of such ownership, Lawler and Wells never asserted any rights inconsistent with the representations to the public. The record shows that the entire course of action of Lawler and Wells, up to the time they demanded $50,000 of the stock of the Seven Stars Gold Mining Company and Lawler became the superintendent and as such went into possession of the mines in the name and on behalf of the Seven Stars Gold Mining Company, as hereinafter shown, was in acquiescence and aid of the schemes and acts of Warner. The reason for this course of action plainly appears to have been the fact that by the success of his promotion Warner could meet his payments to Lawler and Wells.

On November 12, 1892, under the Cowland contract, the second payment of $100,000 to Lawler and Wells,

fell due. This date was close upon the circulation of the prospectus. October 28th Warner secured from Lawler and Wells an extension of time within which to make this payment. Lawler and Wells granted this extension with full and complete knowledge of the preparation and distribution of the prospectuses and maps representing ownership of their property as above shown, and by this extension of time enabled Warner to continue his deception of the public. (Finding 21, Trans., 320.)

This extension was personally arranged by H. H. Warner in Prescott after negotiation with Lawler and Wells, Warner claiming that he was unable to pay the accruing installment because he had been unable to place his securities. While in its findings the Supreme Court uses the language "unable to place securities that he held," without mentioning the securities, yet there could be no doubt that it was the stock of the Seven Stars Gold Mining Company that he had been unable to sell in the time expected. It does not appear that he had or was attempting to sell any other. After securing the extension of time Warner continued his public sale of stock.

Between November 12, 1892, and August 4, 1893, the Industrial Mining & Guaranty Company paid to Lawler and Wells $112,399.96. These amounts were paid at various times as sufficient funds were derived from the sale of stock. The payments were as follows (Finding 47, Trans., 325):

Nov. 12, 1892, Bank of Arizona	$35,000
Nov. 12, 1892, Park Nat. Bank, New York	23,500
Dec. 9, 1892, Bank of Arizona	7,000
Dec. 9, 1892, Bank of Arizona	12,500
Dec. 9, 1892, Bank of Calif., San Francisco	12,500

Dec. 9, 1892,	Bank of Calif., San Francisco..	4,500
Feb. 11, 1893,	Laidlaw & Co., New York.....	4,500
Feb. 11, 1893,	Bank of Arizona.....	4,500
June 3, 1893,	Laidlaw & Co., New York.....	4,500
June 5, 1893,	Laidlaw & Co., New York.....	2,200
Aug. 4, 1893,	Bank of Arizona.....	4,500

The Supreme Court finds (Finding 40, Trans., 323):

> "That the Seven Stars Gold Mining Company duly authorized the Industrial and Mining Guaranty Company to act as its agent in the sale of stock, and all of the stock of the Seven Stars Gold Mining Company which was at any time sold under the American prospectus was so sold by the Industrial and Mining Guaranty Company, and the latter received from the stock purchasers all the moneys which were paid on account of the purchase price of such stock."

It is true that the identical moneys derived from the sale of stock were not transmitted to Lawler and Wells. The industrial Mining & Guaranty Company was promoting other enterprises at the same time as this Seven Stars Company; but as the fiscal agent and financial company it sold the stock, received the proceeds and deposited such proceeds in its general bank account and out of this general bank account made the payments above mentioned. The Supreme Court expressly finds that the "Seven Stars Gold Mining Company had no property other than its interest in said mines and no source of income other than the sale of its stock. (Finding 28, Trans., 321.) Likewise the Supreme Court expressly finds that the payments above mentioned were made from money derived from the sale of stock of the Seven Stars Gold Mining Company.

Finding 26, Trans., 321, is as follows:

> "On May 20, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company."

Eleven thousand two hundred dollars was paid to Lawler and Wells after May 20, 1893. (Find. 47; Trans., 325.)

The sale of stock was the sole means adopted to raise money for the Seven Stars Gold Mining Company. (Finding 28, Trans., 321.) When sales of stock ended payments to Lawler and Wells ceased.

The entire amount paid to Lawler and Wells by the Industrial Mining & Guaranty Company was paid within a few days over two months after the time books of subscription to the stock were opened. Books were opened October 6th. (Trans., 19.) Subscriptions were payable $1 per share on application, $1 per share on allotment, and $3 per share thirty days after allotment. (Trans., 18.) Between November 12, 1892, and December 9, 1892, the Industrial Company paid to Lawler and Wells $90,500. (Trans., 325.) Likewise during the same period the largest payments were made them from the operation of the property. (Trans., 106.)

While the Supreme Court of Arizona expressly finds, as above shown, that Lawler received notice in writing on May 20, 1893, that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company, yet the Supreme Court elsewhere in its finding say, that they had no such knowledge, prior to the commencement of this action. (Finding 50, Trans.,

325.) It is clear that the express finding of written notice of the fact must control. Moreover, it appears that this finding of express notice in writing was one which the Supreme Court itself added to the findings of the District Court. (Trans., 199.)

In addition to the $112,399.96 paid to Lawler and Wells by the Industrial Mining & Guaranty Company out of the proceeds of the sale of the stock, there was paid to Lawler and Wells, by the Industrial Mining & Guaranty Company, while it was in operation of the mines, $19,987.61, and by the Seven Stars Gold Mining Company out of the proceeds of the operation, $47,812.25, aggregating in all $67,799.86. The payments to Lawler and Wells may be summarized as follows:

Between May 12 and 24, 1892, from H. H. Warner . . . . . $ 51,000

Between June 15 and September 18, 1893, from proceeds of operation of the mine. . $ 67,799.86

Between November 12, 1892, and August 14, 1893, from sale of stock $112,399.96

The Industrial Mining & Guaranty Company between June 15, 1892, and September 18, 1893, put into the property for operating expenses, purchase of machinery, supplies and improvements the sum of $112,411.32. (Finding 58, Trans., 327.)

While the Seven Stars Gold Mining Company was in operation of the property and from such operation paid Lawler and Wells $47,812.25 (Trans., 43) the Industrial Mining & Guaranty Company was paying the entire expense of the operation of the property. (Abst., 54.) Under the Cowland contract Lawler and Wells were to receive "all the proceeds derived" from the operation of the property. (Trans., 33.)

After November 1, 1892, all remittances to Lawler and Wells were placed to the credit of the Seven Stars Gold Mining Company. (Finding 30, Trans., 321.)

On May 8th, Warner made a general assignment for the benefit of his creditors. (Trans., 320.)

May 11, 1893, Warner obtained another extension of time from Lawler and Wells. It was then agreed in writing (Trans., 56) that the payment falling due on May 12, 1893, might be made $9,098 in cash and $4,500 on June 1, 1893, and a like sum to be paid on the first day of the following July, August, September, October and November, 1893. (Finding 23, Trans., 321.) That as a part of the conisderation for the granting of this further extension Warner delivered to Lawler and Wells $50,000 par value of the guaranteed capital stock of the Seven Stars Gold Mining Company and *caused the appointment of Lawler as manager of the mines for the Seven Stars Gold Mining Company.* (Finding 24 and 25, Trans., 321.) As manager, in behalf of the Seven Stars Gold Mining Company, Lawler took possession of the property on May 13, 1893. He remained in possession as such manager until September 10, 1893. While Lawler was thus managing the property for the Seven Stars Gold Mining Company, he paid in its name to himself and Wells under the Cowland contract $2,355.37. (See stipulation of certain facts, Trans., 106.)

Under the agreement of extension of May 11, 1893, $4,500 was to be paid to Lawler and Wells on September 1, 1893. Warner had deceived the public to the limit and could sell no more stock. He made default in this payment and thereupon and on September 10, 1893, Lawler and Wells retook possession of the mines and

took down the escrow contract and deed. (Find. 31, 32, 33, Trans., 322.) Since then they have insisted that they are entitled to keep the mines and retain the moneys paid them as herein shown.

The first payments which came from the subscribers was paid to Lawler and Wells through the Bank of Arizona November 12, 1892, so that the first payment which came from the subscribers was made to Lawler and Wells some twelve days after the first extension. (Trans., 325.) The three last sums which are included in the amount of $112,339.96 received by Lawler and Wells from the money of subscribers were paid as follows: June 5, 1893, Laidlaw & Co., N. Y., $4,500; June 5, 1893, Laidlaw & Co., N. Y., $2,200; August 4, 1893, Bank of Arizona, $4,500. The two sums paid through Laidlaw & Co. were remitted through the Bank of Arizona, and all three of these items, aggregating $11,200, were so paid to and received by Lawler and Wells through the Bank of Arizona while Lawler was acting as manager of the Seven Stars Company.

It is clear, therefore, that if Lawler and Wells had declared the secret escrow agreement forfeited, instead of agreeing to an extension on October 31, 1892, the fraud and imposition upon plaintiffs and other subscribers would have been defeated.

No fact has been found showing or tending to show, and it has not been claimed that Warner made any effort to conceal from Lawler and Wells any of his plans or his acts in the promotion of the property, as herein shown.

On May 11, 1893, Lawler was elected a director of the Seven Stars Gold Mining Company, but received no notice of such election. (Find. 36, Trans., 322.)

The Industrial Mining & Guaranty Company paid out as a dividend on the stock of the Seven Stars Gold Mining Company to various stockholders $11,533.07. (Finding 60, Trans., 327.) At the time of receiving this dividend none of the stockholders had notice of the escrow agreement or of any interest or claim of Lawler and Wells.

On April 4, 1894, several persons who purchased stock met at Jersey City, New Jersey, and as a result of that meeting this suit was begun. (Find. 62, Trans., 327.)

The names of the subscribers to the stock, the amounts of their subscriptions and the cash paid appear in the transcript, page 108 to 140.

It will be noted that the Supreme Court of Arizona found that one of the appellants, Clinton B. Wiser, was a director of the Seven Stars Gold Mining Company and assisted in circulating the prospectus, and that he knew that the title to the property in controversy was not vested in the Seven Stars Gold Mining Company. (Trans., 39; Trans., 323. He is the only party who joined in this suit or who purchased stock that the Supreme Court finds had such knowledge. As to the effect of this finding on the rights of the other appellants and other stockholders, see Brief, *infra*.

August 18, 1893, a receiver was appointed for the Industrial and Mining Guaranty Company, and Seven Stars Gold Mining Company in New Jersey. (Finding 29, Trans., 321.) Demand upon the receiver to sue, and his refusal was proved. (Finding 62, Trans., 327.)

The foregoing, we believe, are the material facts.

We ask the court to examine the amended bill as the same appears in the transcript (Trans., 57), which will save its repetition here. Upon such examination of the

amended bill it will plainly appear that all its material averments are fully supported by the admissions of record and findings of the Supreme Court of Arizona.

In connection with the opinion of the Supreme Court of Arizona (Trans., 274) we respectfully request that this Honorable Court consider the consideration of that opinion in the petition for rehearing. (Trans., 292.)

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1902.

Clinton B. Wiser, C. M. Field, John A. Kerr, James A. Ferguson, Dorsey Neville, Mary M. Heater, John J. Miller, Henry L. Mugsford, William J. Foster, Edgar G. Miller, L. F. Hoirne, Sidney G. Law, Edward M. Smith, Harper M. Smith, Benjamin Goodman, Lester M. Crouch, John B. Clute, Katie T. Courtney, H. S. Anders and Cecil Quentin,

Appellants,

vs.

John Lawler, Ed. W. Wells, Seven Stars Gold Mining Company, Industrial Mining & Guaranty Company, and John Griffin, Receiver,

Appellees.

Appeal from the Supreme Court of the Territory of Arizona. No. 174.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

Come now the appellants, Clinton B. Wiser, C. M. Field, John A. Kerr, James A. Ferguson, Dorsey Neville, Mary M. Heath, John J. Miller, Henry L. Mugsford, William J. Foster, Edgar G. Miller, L. F. Hoirne, Sidney G. Law, Edward M. Smith, Harper M. Smith, Benjamin Goodman, Lester M. Crouch, John B. Clute, Katie T. Courtney, H. S. Anders and Cecil Quentin, by G. W. Kretzinger and M. F. Gallagher, their solicitors, and respectfully assign and specify errors upon the record of the proceedings herein as follows:

I.

The District Court of Yavapai County, Arizona, and the Supreme Court of Arizona erred in not adjudging and decreeing that Lawler and Wells by estoppel have forever lost their right to insist on the terms of the escrow agreement of May 12, 1892, or to assert that they have any title or interest in the mines described in the prospectuses and maps of the Seven Stars Gold Mining Company.

II.

That the District Court of Yavapai County, Arizona, and the Supreme Court of Arizona erred in not adjudging and decreeing that appellants for themselves and others in like estate are entitled to a money decree against Lawler and Wells for $112,339.96 paid them by the Industrial Mining & Guaranty Company, and the $47,812.25 received by Lawler and Wells as the gross proceeds of the operation of the mines in controversy, produced by and at the sole expense of the Seven Stars Gold Mining Company.

III.

The District Court of Yavapai County, Arizona, erred in decreeing, and the Supreme Court erred in affirming the decree, that appellants were entitled to no relief and erred in dismissing the complaint.

IV.

The judgments and decrees of the District Court and Supreme Court of Arizona in this cause are contrary to the admissions of record made by appellees and the findings of fact made by the Supreme Court of Arizona.

V.

The Supreme Court of Arizona erred in not reversing the decree of the District Court and instructing that court to enter a decree, upon the prayer of appellants for general relief, adjudging and decreeing a lien upon the mining property in controversy of the same nature and to the same amount as was provided in the final decree entered in this cause by the District Court on July 12, 1898. (Trans., 165.)

Wherefore said appellants pray that the judgments and decrees of the District Court of Yavapai County, Territory of Arizona, and the Supreme Court of Arizona, be reversed, with such instructions for the entry of a decree in this cause in favor of appellants and others in like estate as to this Honorable Court may seem just and equitable in the premises.

J. W. Bretzinger.

M. F. Sweeney,

Solicitors for Appellants.

BRIEF.

1. This suit will be sustained in the name of the twenty American and English stockholders here suing on behalf of themselves and all others in like condition.

Jones v. *Bolles*, 9 Wall., 364.
Smith v. *Swormstedt*, 16 How. (U. S.), 288.
Bosher v. *Richmond*, 89 Va., 455.
Cook on Stock and Stockholders, 737.
Beach on Modern Eq. Pr. Secs., 63, 67.
Barcus v. *Gates*, 89 Fed., 791.

2. Jurisdiction in equity on grounds of fraud, misrepresentation, equitable estoppel, and the prevention of multiplicity of suits, is unquestionable.

Jones v. *Bolles, supra.*
Drexel v. *Berney*, 122 U. S., 241.

3. In statements sent to the public for the purpose of inducing investments in a corporation, representations of fact must be made with strict accuracy, and every fact material to the investment must be disclosed.

Bisphams Eq. 5th, Sec. 208.
Directors, etc., v. *Kisch*, 2 Law Rep. "English and Irish Appeals," page 113.
Lagunas Nitrate Co. v. *Lagunas, etc.*, 68 L. J. (Ch.), 699.
Ry. Co. v. *Muggeridge*, 1 Dr. and Sm., 363.
In re Olympia, L. R. (Ch. Div., Vol. 2, 1898), 153.
Edington v. *Fitzmaurice*, 29 Chan. Div., 459.
Henderson v. *Lacon*, Law Rep., 5 Eq., 262.
Hubbard v. *Weare*, 79 Iowa, 678.
Hayward v. *Leeson*, 176 Mass., 310.

4 The prospectus and accompanying documents must be construed together to determine meaning of any part.

Schyville, etc., Co. v. *Moore*, 2 Whart., 491.

5. The effect produced by the whole prospectus and map is to be considered.

Andrews v. *Mockford*, L. R., Vol. 1 (Q. B.), (1896), 372.

Arnison v. *Smith*, 41 L. R. (Ch. D.), 359.

6. The court, in reading statements of this character circulated generally among the people, will consider how they would influence the ordinary mind.

Ry. Co. v. *Muggerridge*, 1 Dr. & Sm., 363.

Sessions v. *Rice*, 70 Iowa, 306.

Arnison v. *Smith*, 41 Law Rep., Chan. Div., 359.

Ellsworth v. *Campbell*, 54 N. W., 477.

Greenwood v. *Leather, etc.*, 69 L. R. (Ch.), 135.

7. Due weight should be given to the testimony of the large number of persons who say they were led by the statements in the prospectus to believe the company the absolute owner of the mines.

Clark v. *Dickson*, 95 Eng. Com. Law Rep., 463.

8. The public had the right to rely on the prospectus without inquiry.

Bosher v. *Richmond, supra.*

Clark v. *Dickson, supra.*

Andrews v. *Mockford*, L. R., Vol. 1 (Q. B.), 1896, p. 372.

Wilson v. *Higbee*, 62 Fed. Rep., 723.

Quirk v. *Thomas*, 6 Mich., 120.
Morgan v. *Skiddy*, 62 N. Y., 325.
Thomp. on Corp., Sec. 1,312.
Richardson v. *Silvester*, L. R., 9 Q. B., 34.

9. The false representation must be material to the investment, but it need not be the sole inducement.

Morgan v. *Skiddy*, 62 N. Y., 319.
Peek v. *Derry*, 37 L. R. (Ch. Div.), p. 541.
Bigelow on Fraud, Vol. 1, p. 544.
James v. *Hodsden*, 47 Vt., 127.
Arnison v. *Smith*, 41 Law Rep., Chan. Div., 359.
Pulsford v. *Richards*, 17 Beav., 96.
Smith v. *Chadwick*, 20 Law Reports (Ch. Div.), 27.
Edgington v. *Fitzmaurice*, 29 Ch. Div., 459.

10. The law presumes that subscriptions coming in within a reasonable time after the general circulation of a prospectus, were induced by it. "The estoppel will be extended far enough to protect every one who may have been presumed to have acted upon or been governed by it."

Herman on Estoppel and Res Judicata, Secs. 794, 795, and cases cited.
Hatch v. *Spooner*, 13 New York Sup., 642.
Bradley v. *Poole*, 98 Mass., 183.
Smith v. *Chadwick*, 9 App. Cases, 187.

THE ESTOPPEL.

11. The rights of Lawler and Wells, under the Cowland contract, will be postponed to the equities of these purchasers of stock, because:

(*a*) Lawler and Wells enabled the fraud to be committed by putting the Seven Stars Gold Mining Company in the open possession and operation of the property, and concealing their own rights therein.

(*b*) They were silent and acquiescent with knowledge and full opportunity, when equity required them to assert their rights and stop the fraud.

(*c*) They knowingly aided in the perpetration of the fraud by participating in its inception, furnishing data, reports, map, etc., and with full knowledge, excusing defaults and extending payments.

(*d*) They accepted and still retain, with knowledge, moneys obtained from the public through the agency of their property and by representations of ownership which they now seek to contradict.

Gill v. *Griffith & Schley*, 2 Md. (Chan.), 270.
Wendell v. *Rensselaer*, 1 Johns. Chan., 353.
Pom. Eq. Jur., Vol. 2, Sec. 802.
Watson v. *Threlkeld*, 2 Esp., 637.
Ramsden v. *Dyson*, L. R. Eng. and Irish App. Cases, Vol. 1 (1866), 135.
Jones v. *Bolles*, 9 Wall., 364.
Horn v. *Cole*, 51 N. H., 287.
Gregg v. *Wells*, 10 Adolphus & Ellis, 90.
Jowers v. *Phelps*, 33 Ark., 465.
Lucas v. *Hart*, 5 Iowa, 415.
Anderson v. *Hubble*, 93 Ind., 570.
Herrman on Est. and Res. Judicata, 943, 938, 939, 952, 953, 954.

Kettlewell v. *Watson*, Law Rep., 26 Chan. Div., 507.
Radant v. *Werheim*, 106 Wis., 600.
Cairncross v. *Lorimer*, 3 MacQueen App. cases, 829.
Truesdail v. *Ward*, 24 Mich., 117.
O'Connor v. *Clark*, 170 Pa. St. Rep., 318.
Bank v. *Roop*, 48 N. Y., 292.
Heyn v. *O'Hagan*, 60 Mich., 150.
Pickard v. *Sears*, 6 A. & E., 469.
Wells v. *Pierce*, 27 N. H., 503.
Powers v. *New Haven*, 120 Ind., 185.
Hendrix v. *Southern Ry. Co.*, 130 Ala., 205.
Green v. *Smith*, 57 Vt., 268.
Logan v. *Gardner*, 130 Pa. State., 588.
Tilton v. *Nelson*, 27 Barb., 595.
Storrs v. *Barker*, 6 Johns. Chan., 166.
Richardson v. *Hyams*, 1 Lou. Ann., 286.

(aa) The principle of the doctrine of equitable estoppel is honesty and fair dealing, and in its application the court seeks to make parties do what honesty and fair dealing require.

Citations, *supra*.

(bb) No contractual or fiduciary relation necessary; knowledge imposes the duty to disclose the legal title.

Logan v. *Gardner, supra*.
Anderson v. *Hubble, supra*.
The Ottumwa Belle, 78 Fed. Rep., 643.
Cases under 8, *supra*.

(cc) Intent to mislead unnecessary; "fraudulent effect" or "unjust result" sufficient.

Hart v. *Giles*, 67 Mo., 179.

Dair v. *U. S.*, 16 Wall., 1, 4.
Hill et al. v. *Blackwelder*, 113 Ill., 283.
The Ottumwa Belle, 78 Fed. Rep., 643.
Horn v. *Cole*, *supra.*
Anderson v. *Hubble*, *supra.*
Building Ass. v. *Trevette*, 160 Ill., 390.

(dd) Presence of title on record is no excuse or justification for acquiescence, participation, and receipt of benefits here shown on the part of Lawler and Wells.

Sumner v. *Seaton*, 47 New Jersey Eq., 103; 19 Atl.
Kingman v. *Graham*, 51 Wis., 232.
Carr v. *Wallace*, 7 Watts., 394.
Markham v. *O'Connor*, 52 Geo., 183.
Dodge v. *Pope*, 93 Ind., 480.

(ee) There need be no direct communication between parties claiming the estoppel and the party alleged to be estopped.

Anderson v. *Hubble*, 93 Ind., 570.
Clark v. *Dickson*, 95 Eng. Com. La. Rep., 463.
Kelley v. *Fisk*, 110 Ind., 552.
Stevens v. *Ludlum*, 46 Minn., 160.
Other citations, *supra.*

(ff) "Standing by" does not necessarily mean actual presenec.

Anderson v. *Hubble*, *supra*, and cases cited.
Hermann, Sec. 954.
Thompson v. *Blanchard*, 4 N. Y., 309.
Richardson v. *Chickering*, 41 N. H., 380.
Powers v. *Saige*, 75 Wis., 494.
Gatling v. *Rodman*, 6 Ind., 289.

(gg) Estoppel may arise in favor of one not purchasing directly into the title. The doctrine has been applied for the protection of stockholders and creditors.

Jones v. *Bolles*, 9 Wall., 364.

Trenton National Bank v. *Duncan*, 86 N. Y., 222.

Herm. on Est., Sec. 397.

Livermore v. *Maxwell*, 87 Iowa, 705.

(hh) These persons defrauded in the act of purchasing stock are under no theory of the law chargeable with the notice of what the records of the company showed. Even stockholders are not chargeable, as a matter of law, with notice of the acts of officers or resolutions of the directors.

Thomp. on Corp., Sec. 4,455.

Cook on Stockholders, Sec. 731, and cases cited.

(ii) A party who receives benefits gained by representations that the title to his property is in another, will not be permitted to assert rights inconsistent with the transaction to the injury of the person misled.

Brewster v. *Baker*, 16 Barb., 613.

Wilkinson v. *Blades*, L. R. (2 Ch.), 1896.

Breeding v. *Stamper*, 57 Ky., 140.

Whitaker v. *Williams*, 20 Conn., 109.

(jj) A party cannot participate in the fruits of a fraud and at the same time repudiate it as not his act.

Perry on Trusts, Sec. 172.

Texas, etc., Co. v. *Mfg. Co.*, 38 S. W., 404.

Olmsted v. *Hotailing*, 1 Hill., 317.

Crans v. *Hunter*, 28 N. Y., 389.

Morse v. *Ryan*, 26 Wis., 356.

(kk) "He who receives money or property or a benefit of any kind, under an instrument, whatever its character, or his relation to the maker, cannot question the instrument in whole or in part."

In re Peaslee's will, 25 N. Y., Sup., 940.

Havens v. *Sackett*, 15 N. Y., 365.

Birmingham v. *Kirwan*, 2 Schoales & Lefroy's Rep., 444.

Wood v. *Seely et al.*, 32 N. Y., 105.

(ll) In addition to the foregoing the following are different applications of the same principle that here estops Lawler and Wells from asserting their legal rights under the Cowland contract to the injury of these purchasers of stock, after having affirmed the representation of title and apparent ownership in the company by receiving the gross proceeds of the company's operation, the $50,000 of stock, the superintendency of Lawler, and the $112,339.96 sent from New York on behalf of the company.

Field v. *Doyon*, 64 Wis., 560.

Leathers v. *Ross*, 74 Iowa, 630.

Maple v. *Kussart*, 53 Pa. State, 348.

Hermann on Estoppel and Res Judicata, Sec. 1,063; 800.

Wilkinson v. *Blades*, L. R. (2 Ch., 1896).

McConnell v. *People*, 71 Ill., 481.

Daniels v. *Tearney*, 102 U. S., 415.

Franklin v. *Pollard Mill Co.*, 6 South. Rep., 685.

Swain v. *Seamens*, 9 Wall., 254.

Fry v. *Morrison*, 159 Ill., 244.

Kinyon v. *Kinyon*, 27 N. Y. Supp., 627.

(mm) The concealment of the important terms of a transaction or the secret retention of benefits by a grantor have always been held sufficient to show the fraud of a transaction and support a decree for the restoration of the property or money of the deceived purchaser or creditor.

Robinson v. *Elliott*, 22 Wall., 513.
Gill v. *Griffith, etc.*, 2 Md. Ch., 270.
Wendell v. *Van Rensselaer, supra.*

12. That one or two of the stockholders may have purchased with knowledge is no defense. Otherwise to corrupt one, would protect the fraud.

New Sombrero Co. v. *Erlanger*, 5 Law Rep. (Ch. Div.), 73.

13. Equitable estoppel is frequently held a ground for affirmative relief.

Jones v. *Bolles*, 9 Wall., 364.
Kirk v. *Hamilton*, 102 U. S., 68, and cases cited.
Stoors v. *Barker*, 6 Johns. Chanc., 88.
Lucas v. *Hart*, 5 Iowa, 415.
Anderson v. *Hubble*, 93 Ind., 570.
Drexel v. *Berney*, 122 U. S., 241.

14. The estoppel is commensurate with the representation and operates to put the title where it was represented to be.

Grissler v. *Powers*, 81 N. Y., 57.
Beach on Eq. Jurisprudence, 800.
Trenton Baking Company v. *Duncan*, 86 N. Y., 221, and cases cited.
Ellsworth v. *Campbell*, 54 N. W. Rep., 477.

15. A court of equity has power to decree a title to real estate as against a party whose conduct raises an estoppel.

Jones v. *Bolles*, 9 Wall., 364.
Robbins v. *Moore*, 129 Ill., 57.
Lucas v. *Hart*, 5 Iowa, 415.
Kirk v. *Hamilton*, 102 U. S., 68.
Stone v. *Tyree*, 30 W. Va., 701.
Storrs v. *Barker*, 6 Johns. Ch., 88.

As to Prayer for Money Decree.

16. In case Lawler and Wells are allowed to retain the mines, appellants and others in like estate are entitled to a money decree against Lawler and Wells for $112,339.96 paid them by the Industrial Mining & Guaranty Company, and $47,812.25 received by them as the gross proceeds of the operation of the mines in controversy, produced by and at the sole expense of the Seven Stars Gold Mining Company, upon these grounds:

(a) The moneys obtained from appellants and others in like estate by the fraudulent misrepresentations and concealment will be impressed with a trust in the hands of the Industrial Mining & Guaranty Company.

Finlon v. *Jansen*, 99 Calif., 591.
Bank v. *Johnson*, 51 Neb., 546.
Dunn v. *Quilling*, 94 Iowa, 233.
American S. R. Co. v. *Fancher*, 145 N. Y., 552.
Nester v. *Gross*, 66 Minn., 371.
Perry on Trusts, Secs. 171 and 217, and cases cited.
Beach on Trusts and Trustees, Sec. 182.

(b) The funds thus impressed with a trust will be followed into the hands of Lawler and Wells.

Bundy v. *Town of Mon.*, 84 Ind., 119.
Smith v. *Bowen*, 35 N. Y., 83.
Holmes v. *Gilman*, 138 N. Y., 384.
Knight v. *Knight*, 75 Ga., 386.
Calhoun v. *Burnett*, 40 Mass., 599.
U. S. v. *Waterborough*, 28 Fed. Cases, 417.
Insurance Co. v. *Insurance Co.*, 2 C. C. C. A., 541.
Clarke v. *Shee*, Cowper's Rep., 197.
Morrow Shoe Mfg. Co. v. *New England Shoe Co.*, 57 Fed., 685.
Sadler's Appeal, 87 Pa. St., 154.
Swift v. *Williams*, 68 Md., 236.

(c) Upon the facts found by the Supreme Court of Arizona the court should adjudge, as a matter of law, that if Lawler and Wells did not have actual, they had implied or constructive notice of how such funds had been obtained.

Condit v. *Maxwell*, 142 Mo., 266.
Williamson v. *Brown*, 15 N. Y., 364.
Perry on Trusts, Vol. 1, Sec. 223, Note b.
Bank v. *Bank*, 156 N. Y., 459.
Baltimore v. *Whittington*, 78 Md., 231.
Hewitt v. *Loosemore*, 9 Hare's Rep., 455.
Whitbred v. *Boulnois*, 1 Younge and Coll. Ex. R., 303.

(d) The question as to whether upon conceded facts implied or constructive notice arises is a question of law.

Claflin v. *Lenheim*, 66 N. Y., 306.
Birdsall v. *Russell*, 29 N. Y., 220.
Van Doren v. *Robinson*, 16 N. J. Eq., 261.

Plumb v. *Fluitt*, 2 Anstruthers, 432.
Hewitt v. *Loosemore*, 9 Hare's Ch. Rep., 455.
Kennedy v. *Green*, 3 Mylne & Keen's, 699, at page 719.

(e) The fact that the Industrial Mining & Guaranty Company deposited the funds obtained from the stockholders in its general bank account and therefrom drew in favor of Lawler and Wells to make the payments on account of the Cowland contract, does not so destroy the identity of the funds and make relief by money decree impossible. The withdrawals on account of the Seven Stars Gold Mining Company will be attributed to its funds.

In re Hallett's Estate, L. R., 13 Ch. Div., 696.
National Bank v. *Ins. Co.*, 104 U. S., 54.
Pennell v. *Deffell*, 4 De G. M. and G., 372.
Woodhouse v. *Crandall*, 197 Ill., 104.
Hall v. *Otis*, 77 Me., 122.

ARGUMENT.

I.

AS A DISTINCT AND ADEQUATE GROUND FOR AFFIRMATIVE RELIEF IN THIS CASE WE CONTEND THAT AS AGAINST THESE APPELLANTS, LAWLER AND WELLS, BY ESTOPPEL, HAVE FOREVER LOST THEIR RIGHT TO INSIST ON THE TERMS OF THE ESCROW CONTRACT OF MAY 12, 1892, AND THAT THE DISTRICT COURT OF YAVAPAI COUNTY, ARIZONA, AND THE SUPREME COURT OF ARIZONA, SHOULD HAVE ADJUDGED AND DECREED TITLE IN THE COMPANY FOR THE BENEFIT OF APPELLANTS AND OTHERS IN LIKE ESTATE.

The discussion which follows is intended to establish the foregoing proposition and thereby demonstrate the error of the seventh, eighth and eleventh conclusions of law of the trial court, viz. (Trans., 273):

"7. That no duty was at any time imposed upon John Lawler and Ed. W. Wells.

"To prevent or attempt to prevent the circulation and distribution of the prospectuses, maps and blank applications mentioned in the findings; or

"To prevent or attempt to prevent the sales of any shares of stock of the Seven Stars Gold Mining Company; or

"To inform the subscribers or proposed subscribers to said stock that they, said Lawler and Wells, were the owners of the legal title to the property in controversy nor any part thereof.

"8. That the purchasers of the capital stock of the Seven Stars Gold Mining Company were not authorized from reading the prospectuses, maps and blank applications distributed, to so construe the same as to believe or conclude therefrom that the legal title to the property mentioned therein, was vested in the Seven Stars Gold Mining Company.

"11. That John Lawler and Ed. W. Wells, or either of them, are not estopped from asserting herein a forfeiture of the escrow agreement, Exhibit A aforesaid, and the amendments thereto aforesaid, and their legal title to, and the right of sole and exclusive occupation of the property in controversy and every part thereof."

We contend that the facts established by this record show every element of an estoppel against the assertion of title by Lawler and Wells. This record shows the Seven Stars Gold Mining Company held out as the owner of the mines. It shows Lawler and Wells at times passively permitting and again actively assisting in such false appearance and assumption of ownership. It shows a multitude of innocent people investing their money in the belief of the reality of such assumed ownership. It shows, finally, innocent persons grievously injured by the overthrow of such pretended ownership by them who before acquiesced, fostered and affirmed the misrepresentation and received its fruits.

In brief, this record establishes as against Lawler and Wells three things, any of which, under the settled principles of equity, is sufficient to estop, viz.: (1) culpable passivity; (2) active assistance to misrepresentation; (3) receipt of benefits from misrepresentation.

We will consider as briefly as the record will permit the essential elements of this estoppel. In connection

with the discussion we respectfully ask the court to consider the statement, *supra*, and the authorities cited in our brief.

First, the appearance and representation of ownership in the Seven Stars Gold Mining Company and the deception of plaintiffs thereby.

On October 1, 1892, the Seven Stars Gold Mining Company was placed in possession. (Find. 13, Trans., 318.) From that date until the last subscriber had been deceived and drawn into the purchase of shares that company remained in the open and public possession and operation of the mines. They were operated in its name; its superintendent managed them; its workmen extracted the ore; its wagons carried the ore to the railroad; in its name that ore was billed to the smelter; paid by it, the smelter treated the ore; in the name of the company the ore was sold and the proceeds as the money of the Seven Stars Gold Mining Company went to the bank. That company was daily taking away the values in this mining property. Every common mark and *indicia* of title told of the ownership of the Seven Stars Gold Mining Company. This was the physical condition of things.

But physical possession and occupation and the resulting appearance of ownership were but the *background* of the fraud. About the time this possession and operation began Warner prepared and circulated a prospectus, every word of which was written with the manifest and unmistakable purpose to convey the impression, so necessary to induce the sale of stock, that the company was the owner of the property which was offered to the public, and to conceal that Lawler and Wells or any other person had any adverse interest therein. (Prospectuses

and map, Trans., 18-32.) Twenty-one men and women of presumptively ordinary intelligence have testified that the prospectus and map created the belief in their minds that the company owned the property. (Find. 42, Trans., 323.) The test being how the representations would influence the ordinary mind, this evidence is entitled to persuasive weight. The District Court and the Supreme Court of Arizona decided, however, that as a matter of law no person was authorized to believe from the representations in the prospectus and on the map that the property belonged to the company which was offering it for investment. (Trans., 273.) The soundness of this conclusion is an important question in this case. Before proceeding with its discussion, however, we beg to remind the court of the high standard of honesty and accuracy which equity requires from those who have any connection with the public advertisement of property for investment.

In Bispham on Principles of Equity, Sec. 208, the author says:

> "The rules in regard to fairness in representations are to be particularly observed in prospectuses of projected companies. The utmost candor and honesty ought to characterize such public statements. Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will enter into a proposed undertaking and inviting them to take shares upon the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares."

This language was taken by Mr. Bispham from the leading English case of *Ry. Co.* v. *Muggeridge*, 1 Dr. and Sm., 363. A later English case, very often quoted, is *Directors, etc.*, v. *Kisch*, 2 Law Rep. (Eng. and Irish Appeals), 113. In that case this language expresses the views of the court:

> "The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. * * * It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candor and honesty ought to characterize their public statements."

Again, in *Henderson* v. *Lacon*, Law Reports, 5 Eq., 249, the language quoted by Bispham from the Muggeridge case is approved, and, referring to it, the court said: "I must say I think the result of all the cases which have occurred shows the great value of that *golden legacy.*"

In this country with equal unanimity the courts have exacted the same high standard of honesty in these public advertisements of the schemes of promoters.

A very recent case is *Savage* v. *Bartlett*, 78 Md., 561. The Supreme Court of Maryland there held that the law regarding false representations 'applies with even greater strictness in regard to representations set forth in a prospectus issued by a company for the purpose of inviting persons to join in the undertaking," and then quoted with approbation the Kisch and Muggeridge cases, *supra*, establishing the rule in England.

Morgan v. *Skiddy et al.*, 62 New York, 325, was an action in deceit for fraud in prospectus upon which plaintiff relied. Held:

"The company owned no property on the 'Bates lode,' and the testimonials in the prospectus respecting it were misleading and deceptive; they had no reference to the property actually owned by the company, although in connection with the false description they appeared to relate to it, and must have been so understood by persons reading the prospectus who had no other knowledge upon the subject. The false statement in the prospectus related to an existing fact which materially affected the value of the shares; it was prepared for the purpose of circulation and to induce investments in the stock of the company. * * * The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued, no other relation or privity between the parties need be shown, except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus and the resulting injury to the plaintiff. (*Clark* v. *Dixon*, 6 C. B. [N. S.], 453; Central Ry. Co. 1. Kish, Law Rep. [2 Eng. & Irish App.], 100.)"

The equity of this decision is manifest. Those who have the control of a prospectus know or should know all the facts material to the investment. On the other hand, the public know nothing but that which the prospectus tells them, and the very circulation of the prospectus is a general *invitation* to all persons *to rely implicitly* upon its representations. This Lawler and Wells knew, as every man of any experience must know.

With this principle in mind let us examine the public statements upon which the plaintiffs relied. We must read these documents together and take them as one representation. We must remember that they were to be read by persons of ordinary intelligence. That they were intended to influence every reader. We must constantly

keep in mind that persons reading them were in ignorance of everything unexpressed.

The American prospectus (Trans., 18) contains the conspicuous headline, "The Seven Stars Gold Mining Company." This name was taken from that of part of the property itself—"Seven Stars" mine. The caption then recites that the guaranteed dividends and agreement for redemption of stock "are the novel features offered *investors in an already producing gold mine* in Arizona, one of the greatest properties in this country." The public is thus invited to *invest in the property which is made the basis of this prospectus, and upon which the stock solely and necessarily rested for value.* Further, "The holders of the fifteen per cent. guaranteed stock *participate in the full earnings of the company.*" In the presence of the Cowland contract this is an unqualified falsehood. That contract provided that for over eighteen months Lawler and Wells were to receive the entire gross earnings of the corporation. (Trans., 33.) The prospectus continues: "This company presents an unusual opportunity for investors to acquire an interest in one of the richest and most extensive gold mines in the world." In other words, the purchase of stock was to give the stockholder an interest in this mining property—an impossibility in the absence of ownership in the company. The intending purchaser of stock is next given the reason why Mr. Warner connected himself with the enterprise in these words: "Hon. H. H. Warner * * * is so thoroughly convinced of the *extraordinary value of the property* that he has expressed his readiness to place himself at the head of the undertaking."

The prospectus then goes on describing the property, its magnitude and amount of ore in sight, the possibility

of further discovery, the five stamp mill on the property. "The output of the mine is at present about $1,000.00 per day. With 20 additional stamps now in the course of construction the output should reach $5,000.00 per day." *Thus it is the output of the property which is held forth as the inducement to subscribe.* Would not the ordinary man believe that the company asking him to buy stock owned this output? Yet, secretly, the output belonged to Lawler and Wells. Further reference to the property then follows: "It is estimated that an expenditure of $100,000.00 will disclose additional ore to the value of $3,000,000.00." Upon completion of the new mill—to say nothing of the additional mills which it is proposed to erect—the property will earn very large dividends for many years." The public is next told how the mine is being worked by the company, the nature of the vein, environment, etc. Reference is then made to the map which accompanies the prospectus. It is said that the mining property covers 210 acres and connected with it are "dam sites, water sites, timber claims, and town sites." Then prominently stated is the most material and important fact in this connection. Under the clause marked "TITLE"—the clause to which the purchaser would naturally look if the idea of questioning the ownership in the company that was offering the property ever entered into his mind—it is said: *"Titles are unquestionable,* the Seven Stars, Hillside, Happy Jack and other mines *being held* under United States patent."

Consider this last statement as to the title in connection with the fact that it was the Seven Stars Gold Mining Company that was then in actual possession and that the prospectus elsewhere informed the reader that it was that company that *held* the mines, and can there be an escape

from the conclusion that this reference to the title is a direct, unqualified representation that the mines were owned by the Seven Stars Gold Mining Company which was offering the property as its property for general investment?

This construction and representation is confirmed by other clauses which refer to the *company's* trading store, assay offices, staff quarters, blacksmith and carpenter shops, suitable boarding house, lodging house, mill and reduction works, engines and boilers, etc., and the statement that "*the company owns* valuable timber claims covering 180 acres." This construction of the prospectus, however, is put beyond doubt by another clause which states that the company was formed to acquire the property on October 1, 1892. Therefore the reader was led to believe, when he examined the prospectus after October 1st, 1892, and read of the possession of the company and the information as to its ownership, that in fact the company had acquired the property. It will be observed that the books for subscription were not opened until October 6, 1892, so subscriptions to the stock were not invited until after the date when it was stated that under the plan of its formation the company was to acquire the property. Observe, further, that from and after October 1st the company was in exclusive and open possession.

But this assertion of a purpose to acquire the property on October 1, 1892, is in itself manifestly false. Warner, as well as Lawler and Wells, knew that no such purpose existed; they knew that nothing was to occur changing the title on October 1, 1892; they knew that it was impossible under their secret escrow contract for the company to acquire the property until November 12,

1893. This affirmative assertion of a purpose to acquire the property on October 1, 1892, was therefore in itself a fraudulent assertion of a fact.

Edgington v. *Fitzmaurice*, L. R., 29 Chan. Div., 459, was an action of deceit for false representations in prospectus. The misstatements were as to the purpose for which the money received for the stock was to be used. The court held:

> "When we come to the third alleged misstatement, I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans and to develop a supply of fish. The mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. *There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion.* It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

But as a matter of fact as well as of law, the representations of the prospectus were made at the time the prospectus was actually received. The court finds that the distribution of the prospectus was being made during the month of October, 1892. (Finding, 37; Trans., 322.) Only $2,242 was paid for stock before October 1st. (Trans., 108.) Thus the subscribers receiving the prospectus after October 1, 1892, had the right to believe that ownership of the property had in fact already been acquired by the company and that the representations of ownership throughout the prospectus were perfectly truthful.

But with each prospectus was circulated a map. (Finding, 14; Trans., 318.) This map put at rest all inquiry as to ownership. It is undated. Upon it the proposed purchaser saw the mines to which he was invited to subscribe, and underneath the simple and conclusive assertion, *"A map of the group of mines belonging to the Seven Stars Gold Mining Company."*

The effect produced by the whole prospectus and map is to be considered.

In *Andrews* v. *Mockford,* L. R. (Q. B., 1896), 372, it is said:

> "It is an old expedient and seldom successful, to cross-examine a person who has read a prospectus and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious; it assumes that a person who reads a prospectus and determines to take shares on the faith of it, can appropriate among the different parts of it *the effect produced by the whole."*

Statement that will reasonably mislead the ordinary reader wholly ignorant of the facts will be judicially held to be untrue.

> *Greenwood* v. *Leather Shod Wheel Co.,* 69 Law Jr. Reps. (Ch.), 135.

Nowhere in the prospectus, directly or indirectly, is it shown that any other person had a charge or lien upon or interest in the mining property outside of the Seven Stars Gold Mining Company. This, under the authorities, is equivalent to a direct negation that any other person or company held any right or interest in the property. It is the well settled rule that every material adverse fact not stated in public advertisements of this character, especially where such fact renders false affirmative state-

ments, is in theory of law negatived, and the reader is warranted in believing that adverse and injurious facts concealed do not exist.

In Muggeridge case, *supra*, it is stated that those who issue a prospectus must "omit no one fact within their knowledge, the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

The Muggeridge case is directly in point, and we beg to further quote from the opinion:

> "It will be observed that the company is described not only as a railway company, but as a land company, showing that the dealing in or the possession of land was as much part of the functions and objects of this company as the formation of a railway. * * * These are the passages in the prospectus which appear to me more materially to bear upon this question. It is true that in no one of those passages, nor in any part of the prospectus, is it stated in express terms that the right of the land will accrue to the persons who should take shares *instanter*, or that they would have a certain and indefeasible title to the land. But on the other hand, there is a total absence of all mention of, or allusion to, futurity or contingency, or condition affecting the right to the land. There is not the slightest hint, that events might so turn out, that no shareholder would be entitled to a single rood of the land, which is here held out as the attraction to take shares. Now, it does appear to me that a person reading this prospectus and knowing nothing more than what is to be derived from the perusal of it, might well conclude from the language used that, if he accepted shares in the proposed company, he would thereby acquire a right to a certain portion of 200,000 acres of land, which had then been granted to the company, and that he would be entitled to such land unfettered by any condition, or contingency, or uncer-

> tainty, except, of course, the ordinary condition of paying up his calls. That, I think, is the natural and plain import of the language used in this prospectus."

To the same effect are *Gluchstein* v. *Barnes*, 69 L. J. R. (Ch.), 385; In re Olympia Limited, L. R. (Ch. Div.), Vol. 2, 1898.

See also *Hubbard* v. *Weare*, 79 Iowa, 678, in which it is held that to conceal material facts is fraudulent.

In *Ellsworth* v. *Campbell*, 87 Iowa, 532, 477, it was held that defendant concealed conditions to the sale which was equivalent to asserting that it was unqualified.

In *Pulsford* v. *Richards*, 17 Beav., 96, a prospectus case, the court say:

> "What, therefore, in my opinion I have to consider in the present case is, whether the prospectus so issued contained such misrepresentation or suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe that the plaintiff would not have entered into the contract—that is, that he would not have taken the shares."

The suppression of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation that it does not exist.

Tyler v. *Savage*, 143 U. S., 79, 98.

In *Hayward* v. *Leeson*, 176 Mass., 310, the promoters omitted from their prospectus any showing that they were to receive stock in compensation for the promotion. The court held that this concealment invalidated their receipt of such stock and that it could be recovered back at the suit of future stockholders who purchased on the prospectus. This is so, the court held, in the absence of any intention to defraud, because future stockholders are leg-

ally entitled to a full disclosure of all material facts touching the investment.

Lawler and Wells must have known, and they will be presumed to have known, that Warner and the Industrial Company as promoters sustained a fiduciary relation to the subscribers and were bound to state the whole truth as well as nothing but the truth, regarding the property offered to the public.

See *Brewster* v. *Hatch*, 122 N. Y., 349, at page 362.

Hayward v. *Leeson, supra.*

We insist, therefore, that if this prospectus contained no language whose reasonable and natural import is affirmation of title in the company, *yet the omission to disclose the interest of Lawler and Wells was an affirmation that they had no interest. All this Lawler and Wells must have known when they saw the prospectus and map.*

This argument equally applies to the English prospectus. (Trans., 29.) There the representation of ownership was even more direct. It is said that "the mines *owned* by the company are situated in the Eureka Mining District," etc. And further: *"The title is indefeasible,* being United States patent to five claims, together with several locations as easements."

Accompanying this English prospectus was the same map stating that the property belonged to the company, and nowhere in the prospectus is there the slightest intimation that any person had any right or interest in the property excepting the Seven Stars Gold Mining Company.

We conclude, therefore, that appearance and representation of ownership by the Seven Stars Gold Mining Company is unquestionably made out by:

1. The open and public possession and operation in the name of the company and the dealings of the company with the public as owner.

2. The public statements affirming ownership in the company.

3. The concealment of all adverse titles and interests and implied affirmation that Lawler and Wells or any other person except the company had no interest.

Equally unquestionable is the deception of plaintiffs by this appearance and representation of ownership in the company. All the subscribers who have here testified —and it was as impracticable as it was unnecessary to call them all—say that they received the prospectuses and maps through the mail, examined them, and from such an examination believed that the company was the owner of the mining property which they described. Upon this belief they invested in the company. (Trans., 323.)

A prospectus is intended to influence the public, and every member of the public has a right to rely on its representations without investigation.

See cases cited in Brief, *supra.*

In Thompson on Corporations, Sec. 1,472, it is said:

> "It is *not necessary*, in order to support such an action, that the false representations were made directly to the plaintiff. It will be sufficient if they were contained in circulars, prospectuses, or other advertisements, with the view of influencing the public at large, or any member of the public who might be influenced by them, to purchase shares; and that the plaintiff saw them, and, on the faith of the statements contained in them, became a purchaser of shares. Nor is it at all necessary that there should have been any personal communication between the plaintiff and the defendant."

In *Bosher* v. *Richmond Co.*, 16 S. E., 360, held:

> "The law is rigid in its protection of the corporation and stockholders. Cook Stocks, Sec. 657. When a stockholder has been defrauded by such trustees (persons organizing and promoting the company) and seeks redress against the fraud, it is no answer to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception; and WHEN THE REPRESENTATIONS ARE BY A PROSPECTUS, HE IS NOT OBLIGED TO INVESTIGATE FOR HIMSELF, AND INVESTIGATE THE TRUTH OF REPRESENTATIONS, TO PROTECT HIMSELF AGAINST THE CHARGE OF NEGLIGENCE."

The deception is made out even if there were other inducements to the purchase of stock which were not fraudulent. If the appearance and representation of ownership was a *material* inducement to the investment, as all the witnesses testified (Trans., 323), and which is obviously reasonable, that is sufficient.

See cases cited in Brief, *supra*.

Sufficient evidence was taken to show that the public was relying upon the prospectus. (Trans., 323.) It was unnecessary to call each individual stockholder out of an aggregate of over 500 and to get from him exactly how and when he purchased. The law will presume that subscriptions coming in within a reasonable time after the general circulation of a prospectus were induced by it.

In Herman on Estoppel, Sec. 794, the learned author says:

> "Where a declaration is so general in its terms or made under such circumstances as to indicate that it was intended to reach third persons, or the community at large, the estoppel will be extended far enough to protect every one who may have been presumed to have acted or been governed by it."

And at Sec. 795:

> "Courts go a great ways in presuming that acts and declarations calculated to influence third persons have, in fact, reached their ears, and induced them to buy. Thus it was held that *bona fide* purchasers, who, by the deceptive acts of acquiescence of the wife in the will of her husband, might have had reasons for believing that its provisions would not be disturbed, would estop her, though it can not be shown that the purchasers acted on that belief. *This extension of equitable estoppels is peculiarly applicable to those statements which, like letters of credit or the prospectus of an insurance company, are addressed to all the world, and where the defendants had advertised that they would not refuse the payment of a loss on any ground short of fraud, they were held estopped from taking advantage of a failure to comply with the requisitions of the policy which was not actually fraudulent.* * * * In another case, Coleridge, J., says: 'I am of opinion that if an advertisement is put out to induce parties to enter into a certain contract, and an individual does afterwards enter into such contract, and then comes into court and complains of misrepresentation, *it is no part of his case to show that he was cognizant of the advertisement; prima facie, it will be taken that he was influenced by it.*' In another case, some evidence was given from which it might be inferred that the plaintiff saw the advertisement; it was held that the jury might well find that it was a material inducement for him to pay the money." (Authorities cited.)

We submit, therefore, that with the evidence of the twenty-one stockholders, and the legal presumption of reliance in cases of this kind the proof of the deception of appellants and all the other *bona fide* subscribers is amply sufficient.

The learned chancellor who presided at the trial of this cause in the District Court expressed his earnest conviction, after hearing the evidence, as follows (Trans., 157):

"That these stockholders have been the innocent victims of an outrageous fraud, no one who has heard this testimony can, for a moment, doubt."

And further (Trans., 158):

"These plaintiffs as a final resort of all these transactions and dealing between Lawler and Wells are the victims of a great wrong, of which the defendants have reaped almost the entire benefits and for which they have no redress if this court is powerless to afford them any relief."

The fraud and wrong thus found by the learned chancellor were accomplished through the agency of the false appearance and representation of ownership of these mines by the Seven Stars Gold Mining Company.

We have now shown:

1. A false appearance and representation of ownership in the Seven Stars Gold Mining Company.

2. Innocent persons induced by such false appearance and representation of ownership to invest in the stock of the company.

This brings us to the third important point in this question of estoppel, namely:

LAWLER AND WELLS, BY THEIR SILENCE, ACQUIESCENCE, PARTICIPATION, ASSISTANCE, RATIFICATION AND RECEIPT OF BENEFITS, ARE BOUND BY THIS APPEARANCE AND REPRESENTATION OF OWNERSHIP, AND PRECLUDED FROM QUESTIONING THE SAME TO THE INJURY OF THE PERSONS INVESTING IN THE STOCK.

From the admissions of record and the findings of the Supreme Court of Arizona, it appears:

1. Lawler and Wells from the beginning, with

knowledge, acquiesced in the Seven Stars Gold Mining Company dealing with the public as the owner of this mining property.

2. Lawler and Wells furnished the means as well as the opportunity of making and continuing the appearance and representation of ownership in the Seven Stars Gold Mining Company.

3. Lawler and Wells received copies of the prospectus and map and knew of their circulation and distribution and never protested nor made known their rights.

4. Lawler and Wells by extending payments fostered, encouraged and assisted in the deception of the public.

5. Lawler and Wells affirmed the representations of ownership made to the public by accepting money paid for stock on the faith of such representations, by accepting stock for extensions of time, and by the act of Lawler in accepting the management of the Seven Stars Co.

The leading case in this country as to estoppel by silence and inaction is *Wendell* v. *Van Rensselaer*, 1 Johns. Chan, 353. In that case a party took a conveyance of land which he kept secret for several years and permitted persons to purchase various parts of the land from his grantor and to improve the same. Such purchasers knew nothing of the party who had taken the conveyance of the land. He did nothing to mislead or deceive them. He simply remained silent with knowledge. The court observed the deed had been carefully concealed from the knowledge of the world throughout all the transactions between the parties.

> "By this means false colors were held out to the world, and the public were permitted to consider the property as belonging to the testator and to treat with him as the absolute owner".

So, in the case at bar, false colors were held out to the world and the public were permitted to treat with the Seven Stars Gold Mining Company as the absolute owner of the mines.

The court continues:

> "The defendant in his answer admits it to be probable that an opinion very generally prevailed and was entertained by the inhabitants of Albany that the testator continued owner of the land between the date of the deed and his death. The purchases made from him from time to time of parts of the premises were matter of public notoriety."

So here, 300,000 copies of this prospectus were distributed throughout the United States. The promotion was a matter of great public notoriety. Yet, Lawler and Wells, as did the defendant in *Wendell* v. *Rensselaer*, as stated by Chancellor Kent, "preserve a studied silence, and gave no notice to those purchasers, or to the world of his (their) title".

> "After this" said the learned chancellor in that case, "he cannot be permitted to start up with a secret deed (in itself of such doubtful credit) and take the land from *bona fide* purchasers under the testator. Having for such a length of time suffered the public to deal with the testator as the real owner, he cannot now be permitted to question or disturb any title which has thus been procured by his tacit assent. There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. *Qui tacet consentire videtur*,

Qui potest et debet vetare jubet. The East India Company v. *Vincent,* 2 Atk., 83; *Hanning* v. *Ferrers,* 1 Eq. Cas. Abr., 356, pl. 10; Gilb. Eq. Cas., 83; *Raw* v. *Potts,* Prec. in Ch., 35; *Hunsden* v. *Cheyney,* 2 Vern., 150, and the case of Dr. Amyas, there cited; *Styles* v. *Cowper,* 3 Atk., 692; *Jackson* v. *Cator,* 5 Ves., 688; *Dann* v. *Spurrier,* 7 Ves., 231".

This statement of the controlling principle of equity is quoted, approved and applied by this Honorable Court in *Kirk* v. *Hamilton,* 102 U. S., 68.

The learned Chancellor who presided at the trial summarized the facts (and every fact here mentioned by him has since been judicially established of record) as follows (Trans., 160):

> "Considering the fact that at the time of executing the deed and agreement of May 12, 1892, Lawler and Wells had actual knowledge and notice that Warner's intentions were to incorporate a company and to use the language of one of the defendants themselves, 'Work it for all there was in it', the failure to record this agreement so that those dealing with Cowland and Warner and their associates should have constructive, if not actual notice of its existence, and the rights claimed by defendants thereunder; the delivery of possession to Warner, or his agent, and through him, or them, to the Industrial Company, and to the Gold Company, and the circumstances and conditions under which they took and retained the open, notorious and exclusive possession of the property, working, operating and dealing with them, and holding themselves out to the world and to those who did deal with them, that they were the owners of said property; the notice and knowledge which they must have had long before any of this stock was sold, that Warner, whatever his original intentions were, did not intend, or was not able to pay the purchase price himself, but expected to raise it all or at least a greater part of it, by the sale of the stock of this company; their participation, to some extent at least, in the preparation

of this prospectus, and the knowledge which they had, or would have had, had they not closed their eyes and ears, as to its contents, these and all of them are elements as it seems to me, which go to make up this complete and composite whole.

For while I do not give some weight and effect to this prospectus that counsel for plaintiffs do, so far as it charges these defendants, it is one of the elements which go to make up this constructive fraud, and though the testimony is somewhat conflicting, I think the reasonable deduction from it is that Lawler and Wells knew of its preparation and circulation.

Furthermore, these various extensions of the time for the payment under the original agreement, one of which, to wit: the first, was made before a share of this stock had been issued, and which, if it had not been made, would have rendered impossible the unfortunate condition out of which this litigation has arisen. But, by far the most important consideration, and the one which, as it seems to me, is controlling in this case, the acceptance and retention by them of large sums of money which, from their very nature came through this sale of stock. Add to this their conduct prior and subsequent to May 12, 1893, when the extension was made, the circumstances under which it was made, Lawler's election as manager at his and Wells' suggestion, the receipt and retention by them of $50,000.00 of full paid stock of this corporation, and the receipt and retention by them of large sums of money after receiving that stock, and after Lawler had been made manager and had accepted the management of this company, all of these things after they were fully advised of all of the facts and circumstances which had gone before, seem to me—almost if not quite, amount to a waiver of their rights in the future, if not a ratification of all that had been done in the past".

The record shows that at the time Warner put the Seven Stars Gold Mining Company into possession of their mines, Lawler and Wells locked up the contract which reserved their dominant possession and legal title

in the vault of the Bank of Arizona. (Trans., 315.) In that bank this contract remained, wholly concealed from the public throughout all this transaction, so long continued, so widely and publicly advertised and so generally enlisting the confidence and money of the public. At the time of the executio of this escrow contract Lawler and Wells turned over to Warner maps, reports, milling and smelters returns, etc., which were to be used by him in the preparation of the public advertisement by him of the property. (Find. 17, Trans., 319; Find. 20, Trans., 320.) Lawler was present in New York for five days at the office of the Industrial Mining & Guaranty Company while this material thus furnished by himself and Wells was woven into a prospectus. (Finding 20, Trans., 320.) He knew that the description of his property as the property of the Seven Stars Gold Mining Company was not done carelessly or inconsiderately, but designedly and after full deliberation, and for one purpose, namely; to get the public to invest money in stock on the faith of the property and in the belief that the value of the property was the value of the stock.

It is admitted by Lawler and Wells that they received copies of the prospectus and map. (Trans., 183, 2 and 184a,-2) It is found as a fact by the Supreme Court of Arizona that during the month of October, 1892, Lawler and Wells knew of the circulation of the prospectus. (Finding 37, Trans., 322) And again, it is found, under Finding 34, Trans., 324, "that said defendants knew that said prospectuses and maps were being distributed".

It is a well established doctrine that notice of an instrument is notice of its contents.

Vandoren v. *Robinson*, 16 N. J. Eq., 261.

But the moment they saw the map their attention must have been immediately struck by the conspicuous words, "A MAP OF THE GROUP OF MINES BELONGING TO THE SEVEN STARS GOLD MINING COMPANY." (See Map, Trans., 24.) These words apprised them that Warner was telling the public in clear and unqualified language that his corporation was the owner of the mines to which they secretly held title. Turning from the map to the prospectus they saw that Warner was selling to the public stock based entirely upon their mines for its value, and that nowhere in said prospectus did the reader derive the slightest intimation of the existence of the escrow contract or of any right or interest of Lawler and Wells either to the property or its proceeds or to money paid in for stock. As men of experience they knew that the persons who received the prospectus and map could and would rely upon their representations and in all reasonable probability would purchase stock on the faith of the ownership of their mines by the Seven Stars Gold Mining Company; they knew if the actual truth were disclosed, namely, that the Seven Stars Gold Mining Company could only acquire the title to the mines by paying $400,000.00, and that until and unless that amount of money was raised and paid on the contract of purchase the company had but a bare right of occupancy, not a share of stock would in all probability be sold as the wildest speculator would turn from a proposal to build a company upon such a foundation.

They saw this prospectus and map with these representations and with their rights wholly concealed, go forth to the public. From October 1, 1892, until September, 1893 (Find. 32, Trans., 322), while this prospectus was in cir-

culation and deceiving and drawing persons into the purchase of shares, Lawler and Wells did nothing to disclose their rights and prevent the deception of the public. Knowing that their title destroyed the value of the stock, they permitted men and women to buy that stock in ignorance of that title. Mails, telegraph and public press were at their service. They wrote no letter, protested to no officer of the company, gave out no interview, made no public announcement. They never sought to bring home to any creditor, or to the public, the slightest intimation that they and not the Seven Stars Gold Mining Company were the owners of this mining property or its proceeds. They were content to stand by in silence and see Warner get his money from the public to make his payments to them.

But the cause of appellants does not rest alone upon the *silence and inaction* of Lawler and Wells. The record shows affirmative acts of assistance and what is more cogent than all, receipt of the moneys gotten from the public. October 28, 1892, while the prospectus was being sent broadcast throughout the country, Warner went to Prescott. (Find. 21, Trans., 320.) He wanted an extension of time to make the payment falling due on November 12th of $100,000.00. *Then and there Lawler and Wells could have stopped the fraud.* If the representation of ownership had been made without their authority or consent they could then have repudiated and ended it. But they grant Warner an extension of time for a large part of the payment to December 12, 1892, during which time, as the established facts show, Warner would have a chance to get further results from his prospectus. (Trans., 320.) Receiving this extension Warner returned to New York and kept up the sale of the stock.

Was not this extension a *consent* to as well as a participation in the plan Warner was following in floating their property?

May 8th, 1893, Warner made a general assignment for the benefit of his creditors to Job E. Hedges. (Finding 22, Trans., 320.) Lawler and Wells knew of this assignment of Warner. (Finding 23, Trans., 321.) Therefore they must have known that it was impossible for Warner to personally make the payments under the Cowland contract, and they must have known that in such a situation Warner was dependent in the very nature of things upon the sale of stock to enable him to meet the terms of his guaranty to Lawler and Wells. *Nevertheless, Lawler and Wells grant him a second extension of time.* (Finding 23, Trans., 321.)

Moreover as a condition of this extension Lawler and Wells exacted of Warner $50,000.00 par value of the guaranteed capital stock of that company. (Finding, 24; Trans., 321.) Thus Lawler and Wells knowingly and deliberately became stockholders and interested themselves with Warner in this corporation that was a sham company, owning absolutely nothing, and engaged in deceiving the public by representing that it owned a group of mines secretly owned by Lawler and Wells. We submit that the demand and acceptance of this stock is the strongest evidence of the approval of Lawler and Wells of the steps Warner had taken to float the property. But more than this, Lawler and Wells as a further condition for granting this second extension, insisted that Lawler should become the manager of this Seven Stars Gold Mining Company, and on May 13, 1893, Lawler entered upon his duties as such manager, and until September 10, 1893, Lawler acted as manager of the Seven Stars

Gold Mining Company in the possession and operation of the mines in controversy. (Find. 25, Trans., 321.) During all this time the subscribers and stockholders and the public were kept in total ignorance of the legal title of Lawler and Wells, or their right to any of the proceeds of the mine, or to the acts of Lawler and Wells or Warner in reference to the legal title.

May 20, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company. (Find., 26, Trans., 321.) Thus Lawler and Wells were positively informed in writing that they were the beneficiaries of the funds the public were paying to Warner in the belief that Hillside Group of mines *belonged* to the Seven Stars Gold Mining Company. The amount of such funds which they after such written notice actually received is immaterial so far as the question of estoppel is concerned. After the date of this positive notice in writing thus found by the Supreme Court of Arizona, Lawler and Wells received $11,200.00 on account of their escrow contract from the Industrial Mining and Guaranty Company. (Trans., 325.) We respectfully contend that this one fact found and established by the Supreme Court of Arizona, namely, the receipt of this notice in writing that they were receiving funds derived from the sale of the stock, coupled with their continued acquiescence, their failure to protest and their receipt of further funds, establishes incontrovertibly the estoppel here invoked.

Under the repeated decisions of this Honorable Court and other courts, silence with knowledge is sufficient to estop, and to silence must be added, in this case, affirma-

tive acts of participation and receipt of benefits. We will refer to further authorities which announce the principles of equity which, in our judgment, establish the estoppel.

In *Gregg* v. *Von Phul,* 1 Wall. (U. S.), 274, the ruling principle is stated:

> "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser. And justly so, because the *effect of his silence* has actually misled and worked harm to the purchaser."

In *Ramsden* v. *Dyson,* Law Reps. Eng. & Irish Appeal Cases, Vol. 1, p. 129, 1866, Lord Cranworth stated the principles of equity on this subject. He said:

> "If a stranger begins to build on my land supposing it to be his own and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, *it was my duty to be active* and state my adverse title; and that it would be *dishonest in me to remain wilfully passive* on such an occasion, in order afterwards to profit by mistake which I might have prevented."

In *Logan* v. *Gardner,* 136 Pa. St., 588, the court holds:

1. The doctrine of estoppel *in pais* has been very much expanded in modern times.

2. Silence in ignorance of one's rights never estops, "but that mere silence with knowledge, is evidence from which a jury may find an estoppel." "Knowledge cre-

ates the duty to speak, and, where that exists, silence is enough to estop."

3. Acts of encouragement will estop, "without any fraud and irrespective of the party's knowledge of his own rights" on the principle that where one of two innocent parties must suffer, the loss must fall on the one who aided the wrong.

4. The case there at bar belonged to the "class of *Wood* v. *Wilson*, where silence with knowledge of expenditures being made by a party in possession may be sufficient to create an estoppel."

5. The lower court erred in telling the jury "something more than mere silence, something active or positive on the part of the plaintiff, was necessary to estop her."

In *Radant* v. *Wernheim*, 106 Wis., 600, a late and analogous case, there was nothing more than silence of the party held estopped. No affirmative act of assistance appeared.

Same is true in *Boehr* v. *Wolf*, 59 Ill., 470, where a person who held a contract of purchase of land knowing that another was intending to purchase the land of his vendor without notice of the existence of such contract, was held to have forfeited his rights because he failed to notify such other of the true state of the title.

This Honorable Court has frequently applied the same principle.

Morgan v. *Ry. Co.*, 96 U. S., 716.
Kirk v. *Hamilton*, 102 U. S., 68.

In *Jones* v. *Bolles*, 9 Wall. (U. S.), 364, this Honorable Court affirmed a decree that is ample precedent for the relief prayed in the bill in this case. In that case the

complainant Bolles, suing on behalf of himself and all other stockholders of the Mineral Point Mining Company, filed his bill of complaint for an injunction to restrain Jones from suing for, claiming or demanding against said company the purchase money of a certain tract of mining land in Wisconsin or any mineral rents for mineral raised on the same. The charge was that it had been represented by defendant Jones and others that the company had been seized in fee of the land and relying upon that representation Bolles had purchased stock in the company. Jones had executed a warranty deed to the company, but at the same time an agreement had been executed under which agreement he claimed a large balance due him for mineral rents and purchase money. This agreement had been concealed from Bolles at the time he purchased the stock. Jones, in his answer denied that he had made any representations as alleged, but admitted that he, with the president and secretary of the company, were in Boston at the time alleged and attended that meeting at Bolles' house on the subject and that he understood that the secretary had made representations to the effect complained of; that the room was large and pretty well filled and that he did not hear it. The Circuit Court perpetually enjoined Jones from claiming any purchase money or rents under the contract that had been concealed from the purchaser of stock. The court affirmed this decree and the effect of this affirmance establishes three important propositions applicable to this case:

(1) The remedy of appellants is in equity.

(2) It was proper for appellants to sue in their own behalf and in behalf of all stockholders.

(3) The proper decree is one confirming title in the company.

An instructive opinion is that of the Supreme Court of Arkansas in *Jowers* v. *Phelps*, 33 Ark., 465. It is there said:

> "Estoppels *in pais* depend upon facts, which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with wilful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so misled. That would be a fraud. But it is difficult to define special acts or conduct which in all cases would amount to an estoppel. *Generally it is said that if the owner of property—with a full knowledge of the facts, stands by and permits it to be sold to an innocent purchaser, without asserting his claim, he will be estopped.* Although this will not embrace all species of estoppel *in pais*, which may be as diverse as are the nature of human transactions, it is, so far as it goes, about as safe and correct a rule as can be formulated. The leading idea is that a person shall not do, or omit to do, anything regarding his rights which, if taken advantage of by him, would work a fraud upon another; but, in this as in all other cases involving fraud, the exact limits and boundaries of fraudulent conduct are left undefined to be applied by the chancellor to the facts before him. * * * To stand by and see a sale to an innocent purchaser would be, however, a breach of moral duty, unless the owner meant to abide by it."

Hermann on Estoppel, at Sec. 978, citing a large number of authoritative precedents, clearly states the rule as follows:

"Where the owner holds out another or allows him to appear as the owner, or as having full power of disposition over the property, and innocent third parties are led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the sale or conveyance."

In *Truesdail* v. *Ward et al.*, 24 Mich., 117, the same principle is thus expressed:

"'It is a universal law that if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct.' * * * Again, in *Nicholson* v. *Hooper*, Lord Cottenham said: 'A party claiming a title in himself, but *privy* to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction.' 4 Myl. and C., 179, and in *Duke of Leeds* v. *Earl of Amherst* the same judge said: *'If a party, having a right, stands by and sees anothers dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.'*"

The doctrine of estoppel by silence is stated by the Supreme Court of Indiana in *Anderson* v. *Hubble*, 93 Ind., 570, as follows:

> "*A mere failure to give notice of a right,* where another, without knowledge of the facts, is investing his money, and where it may be fairly concluded that he would not do so if informed of the facts, will generally preclude a subsequent setting up of the claim thus concealed."

See to the same effect other cases on estoppel cited in brief, *supra.*

But it is needless to accumulate authority. We invoke general principles. He who is silent when he ought to speak will not be heard when he should in conscience be silent. He who can forbid and does not, is deemed to assent. He who connives at a deceit, which he might have exposed will be justly required to bear the consequences instead of allowing them to fall on the injured party. Where one of two innocent parties must suffer he who trusts most and contributes most must bear the burden. He who once consents can invalidate no act proceeding upon that consent.

We submit it is wholly irrelevant to argue in this connection that Lawler and Wells were under no contractual obligation to the purchasers of stock, or that Lawler and Wells were under no fiduciary relation to the purchasers of stock, or that Lawler and Wells had no intention of deceiving anybody. Contractural obligation, fiduciary relation, and intent to deceive, are alike unnecessary, and their discussion under this point of our case wholly irrelvant. We make this emphatic because the learned counsel for appellees argued repeatedly in the court below that because of the absence of a contractual obligation, of a fiduciary relation, and of an intent to deceive, there could be no estoppel.

In the cases of estoppel quoted in our argument and cited in our brief, no contractual obligation, fiduci-

ary relation or intent to deceive appears. If A sees B selling his horse to C and permits the sale he is estopped. In such a case A and C are in law total strangers. They have made no contract, there is between them no trust relation, and the intent of A is immaterial.

In *Anderson* v. *Hubble*, 93 Ind., 570, held:

> "It is not necessary in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. * * * The cases upon this subject were thoroughly reviewed in *Continental National Bank* v. *National Bank*, 50 N. Y., 575, and it was affirmed that there need not be a purpose or intent to deceive or defraud. In *Blair* v. *Wait*, 69 N. Y., 113, it was said, 'It is not necessary to an equitable estoppel that the parties should design to mislead.' A very strong opinion is that in *Stevens* v. *Dennett*, 51 New Hamp., 324, where it is said: 'Thus, *negligence becomes constructive fraud* —although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be innocent, if innocence and gross negligence may be deemed compatible.' "

See cases cited in brief, *supra*.

In such a case as this courts of equity apply the principles of natural justice, and wherever these require disclosure they raise the duty and bind the conscience and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party.

So also under the well settled principles of equity touching estoppel, it was unnecessary for appellants to show that the representations which deceived them were the work of Lawler and Wells. It is sufficient if Lawler and Wells maintained a culpable silence. As men of any experience, they must have known that the prospectus and map were circulated to sell stock and that persons would receive and read them and therefrom be-

lieve that the Seven Stars Gold Mining Company owned the mines. All cases which we have cited show that any proof that Lawler and Wells affirmatively said or did something to the knowledge of appellants and which deceived appellants is wholly needless.

In *Kelly* v. *Frick*, 110 Indiana, 552, a wife heard representations by her husband that she made no claim to property. She remained silent. It was held that she was estopped from asserting dower, the court saying:

> "Nor was it necessary for them to show that she herself spoke the words which induced the appellees to invest their money, for there was 'a standing by' that effectually worked an estoppel." (Authorities cited.)

Nor was it necessary to prove that Lawler and Wells were physically present at the stock sales. The Supreme Court of Indiana in *Anderson* v. *Hubble, supra*, discusses this question, saying:

> "The term 'standing by,' so often used in the books and reports in discussing cases of estoppel does not mean actual presence or actual participation in the transaction, but it means silence where there is knowledge and a duty to make a disclosure. In *Gatling* v. *Rodman*, 6 Ind., 289, it was held that the phrase '*standing by*' does not import an actual presence, but *implies knowledge under such circumstances as renders it the duty of the possessor to communicate it.* The cases of *State* v. *Holloway*, 8 Blatchf., 45; *Ellis* v. *Diddy*, 1 Ind., 561; *Catherwood* v. *Watson*, 65 Ind., 576, and other cases, approve this definition. In *Richardson* v. *Chickering*, 41 N. H., 380, the definition is accepted as the correct one, and the doctrine of *Gatling* v. *Rodman*, *supra*, expressly approved."

There are many cases where the party claiming the estoppel had no knowledge of the real owner, who was

silent, secret and passive. In point are *Anderson* v. *Hubble, supra; O'Connor* v. *Clark,* 32 Atl., 1029; *Logan* v. *Gardner,* 136 Pa. St., 588; *Richardson* v. *Hyams,* 1 Lou. Ann., 286.

In *Logan* v. *Gardner, supra,* the Supreme Court of Pennsylvania said:

> "Knowledge creates the duty to speak, and where that exists, silence is enough to estop."

In the great number of cases in which the owners of property have been held estopped to assert title as against a municipality or railroad company that has expended money in improvements or construction upon their land, it is almost invariably the case that the municipality or railroad company knew nothing of the person who subsequently claimed to be the owner and were not influenced in the slightest degree by any affirmative act on his part.

It is well settled that a party who enables another to assume the credit of ownership, need not be actually present when the act is done by which the third party is deceived.

Radant v. *Werheim,* 106 Wis., 600.
Thompson v. *Blanchford,* 4 N. Y., 309.

Upon the principles and authorities cited we respectfully submit that this record presents a clear case of estoppel by culpable silence and participation and assistance in misrepresentation of title.

BUT WE NEED NOT REST OUR CLAIM OF ESTOPPEL UPON THE SILENCE OR ACQUIESCENCE OR ASSISTANCE OF THE REAL OWNER. WE HAVE AN INFINITELY STRONGER CASE IN THE RECEIPT BY LAWLER AND WELLS OF THE BENEFITS OF THE FRAUDULENT PROMOTION OF THE PROPERTY.

Lawler and Wells received, with knowledge, the moneys taken from the public by a deception in the use of their property and by representations and apparent ownership which they now seek to contradict.

It is found by the Supreme Court that the Industrial Company was the agent of the Seven Stars Gold Mining Company, to sell the stock and apply the proceeds in the interest of its principal. (Find. 40, Trans., 323.) As such agent it paid the cost of the operation of the property, while Lawler and Wells were receiving the gross proceeds of such operation as provided in the concealed escrow agreement. (Find. 47; Trans., 324.) It is conceded further that the Industrial Company sent direct to Lawler and Wells, or their agent, the Bank of Arizona, $112,339.96 under the Cowland agreement.

The Supreme Court expressly finds that the Seven Stars Company had no source of income other than the sale of stock (Finding 28, Trans., 321) and of necessity, therefore, the moneys paid for it to Lawler and Wells were derived from that source.

Moreover, the Supreme Court finds that on May 20, 1893, Lawler and Wells received express notice in writing that remittances on account of the Cowland contract were being made from funds derived from the sale of stock. (Finding, 26; Trans., 321.) Such receipts from the sale of stock made the remittances to Lawler and

Wells possible. Without the stock sales they never would have been made. As heretofore shown, Lawler and Wells had perfect knowledge of this fact. With this knowledge they received and retained the moneys out of which appellants were defrauded.

In this situation, after receiving the benefit of the fraudulent promotion, will Lawler and Wells be permitted to dispute the representations made to the public or assert the title which was concealed?

The truth is this: Lawler and Wells insist upon retaining $112,339.94 paid in cash and $67,799.86 paid to them as the proceeds of the ore extracted by the Seven Stars Company and the benefit of enormous development work and valuable fixtures and machinery, when they know that all of such cash, ore, development work and machinery were realized and produced by this false prospectus which their acquiescence sanctioned and to which their successive extensions gave full play. And they insist on keeping all this and with it the mines under a harsh forfeiture clause in a secret contract, the terms of which were contradicted and concealed by this prospectus, which, to their knowledge and with their consent, was robbing the public of the money which they were receiving.

No rule of law is sustained by more abundant authority than that if one person, even though a stranger, without authority or right, assumes to negotiate or dispose of the property of another, who is the legal owner, and such owner knowingly receives and retains profits, proceeds or benefits flowing from such negotiation or disposition, he thereby affirms and validates and estops himself from questioning rights growing out of such negotiation and disposition.

See authorities cited in Brief, *supra*.

In *Field* v. *Doyon*, 64 Wis., 560, 25 N. W., 653, a mortgagee of certain property with knowledge that the property had been illegally sold by the mortgagor, accepted the purchase money. The court say:

> "The fact of such sale was known to the mortgagee when he received the purchase money for the property so sold, and having received the money without objection, knowing of the fraud which would be perpetrated upon the purchaser if he should enforce his mortgage, equity and good conscience require that he shall either release his mortgage or return the purchase money. * * * The injustice of holding both the money and property is so apparent that it is unnecessary to cite authorities upon the point. * * * The fact that the sale was made without his knowledge at the time does not change the relations of the parties. * * * Bigelow on Estoppel, 3d Ed., 579, says: 'In like manner, if one without actually inducing another to act in a particular way, assent to the thing done and seek to derive a benefit from it, he cannot, in case of disappointment, repudiate the validity of the act assented to.' *Beall* v. *Barkley*, 10 B. Mon., 261, 254; *McConnell* v. *People*, 71 Ill., 481."

In re Lart, *Wilkinson* v. *Blades*, Law Reps., 2 Ch., 788, 1896, it appeared that Wilkinson had stood by while legal proceedings were being had for the construction of a will. He was not a party to the action or bound by anything therein determined, but he accepted as heir a part of an annuity divided in accordance with the decree. Chitty, J., held that Wilkinson was not bound by the judgment as a matter of law, *"but by his conduct after the judgment and under the judgment, knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that judgment might prove adverse to his material interests, he stood by, and by taking the money has acquiesced if ever a man could acquiesce."*

In *Brewster* v. *Baker,* 16 Barb., 613, the defendant claimed that he purchased a boat from one Thompson and had no knowledge of plaintiff's title; and that plaintiff after being apprised of the sale received from Thompson a part of the purchase money paid for the boat. Held:

> "It is a well-established principle that where the owner of property stands by and sees another sell it as his own to a *bona fide* purchaser and makes no objection and gives no notice of his rights, he will be held to have sanctioned the sale, and will not afterwards be permitted to assert his title as against such purchaser; and the same rule I apprehend prevails where the owner is informed of the sale of his property by another upon credit and does not object to it or give the purchaser notice of his rights, but stands by and permits such purchaser to pay the purchase money as it becomes due to the vendor and receives the whole or any portion of it from the vendor."

So, in *Breeding* v. *Stamper,* 57 Ky., 174, the court applied the doctrine that where a party receives part of the purchase money derived from the sale of his property he can not afterwards say that the sale was unauthorized and fraudulent and that the party who paid the money he received obtained no interest in the property.

To the same effect is *Whittaker* v. *Williams,* 20 Conn., 97.

So in *Osgood* v. *Nichols,* 5 Gray., 420, the court held that he who receives the fruits of a sale is estopped from setting up title in himself inconsistent with that which the seller pretended to convey.

Bank v. *Roop,* 48 N. Y., 292, involved an equitable estoppel. Said:

> "He was present at the time of the conveyance to Roop. He knew the facts. He would be benefited by having the cash payment of Roop on account of

> the purchase price increased, as the money was to be applied to debts owing by Merrill B., either to him or for which he was liable. He allowed Roop to make his payments under his mistaken and injurious belief as to the facts. He should then have spoken. The principle is too well settled to require the citation of authority that one can not stand by in *silence* when he knows that another is acting upon an erroneous state of facts and thereafter claim the benefit of the correct state of facts, if such claim will tend to the injury of the other person. *Much more, is this rule just in a case where, by his silence, he derives an immediate and direct advantage over the injured party. His silence then becomes deceit and fraud. The suppression of the truth in such a case has the same effect and is equally culpable with the assertion of a falsehood.*"

In *Texas Consol., etc.*, v. *Dublin, C. and M. Co.*, 38 S. W., 407, certain officers of a corporation, to effect a transaction, made false representations. The corporation, taking and enjoying the fruits of the transaction, asserted that it was not affected by the false representations because such persons had no right or authority to make them. Held:

> "But appellant says that it should not be held responsible for the fraud because it was not accomplished by the acts of the corporation, but was through the *ultra vires* acts of its officers and directors. In other words, it says to the appellee: 'You have been cheated and swindled, not by me, out of your property, but by my officers and directors, whom I could not authorize to defraud you, and because I could give no such authority you can not disturb me in my enjoyment of the fruits that I received from the fraudulent hands of my agents.' How stands the law on this proposition? * * * *A corporation can not, any more than a natural person can, retain an advantage which has come to it by fraud, without thereby making itself answerable to the fraud.* This being so, it is no answer to an application to be re-

lieved from such a contract for the corporation to say: 'It is true you were entrapped into the contract by fraud. Fraudulent misrepresentations and concealments were the proximate causes which induced the agreement on your part. But, as this fraud was committed by one not our agent, we claim the advantage accruing from it.' This upon its face is absurd. By adopting the contract, the corporation adopts the means by which it was procured. The person who procured it becomes their agent, and the acts by which he procured it becomes their acts by ratification."

Lawler and Wells can not derive a benefit from this transaction without accepting it as it was—without adopting the instrumentalities upon which the sale to the public proceeded.

Elwell v. *Chamberlin*, 31 N. Y., 611.

Equally strong is the estoppel upon another well settled principle. Lawler and Wells have accepted benefits gained by this prospectus. They have accepted the fruits of that instrument.

In Re Peaslee's Will, 25 N. Y. Sup., 940, held:

"The learned counsel for the appellant, while citing no authorities asserting a contrary proposition, has carefully analyzed and elaborately discussed nearly all the cases we have cited, in order to make it appear that they are distinguishable from the case at bar. *In their facts they are different from this case, and they differ from each other, but they all tend to make good the assertion which may be found running through the books, that he who receives money or property or a benefit of any kind under an instrument, whatever its character, or his relation to the maker of it, can not question the instrument, in whole or in part.*"

See also *Havens* v. *Sackett*, 15 N. Y., 365.

Hermann, at Sec. 800, says:

> "No man can adopt that part of a transaction which is favorable to him and reject the rest to the injury of those from whom he derived the benefit. This application of the law of equitable estoppel admits of less mistake or misapprehension than any other, and is a favorable doctrine with all tribunals whenever the circumstances are such as to admit of its application. Therefore, where those who are entitled to avoid a sale, adopt and ratify it, equity will estop them from afterwards setting it aside for reasons which are too plain for statement. *Where a sale of land is made no one can be permitted to receive both the money and the land.*"

We have liberally quoted the language of these authorities because in our judgment they apply exactly and decisively to the case at bar. Viewing this case in the aspect most favorable to Lawler and Wells, it is this: Warner offered their property to the public for investment as the property of a corporation he was promoting. In this way he realized a large sum of money paid by people who believed they were obtaining an interest in the property and its earnings. Lawler and Wells accepted and now insist upon retaining the moneys paid in by the parties thus deceived. At the same time they insist upon keeping the property which Warner offered to the public. Is such conduct honest. Is it equitable? Does not every dictate of common honesty and every principle of equity demand that if they retain the money of the public they must make the promotion good—they must relinquish the title to the property which was the basis of the stock sold, or return the moneys received from the subscribers?

Did the presence of the title of Lawler and Wells of record prevent the estoppel here claimed?

The Supreme Court found that Lawler and Wells "did not at any time protest against the preparation or circulation of the prospectuses, maps and applications for subscriptions to stock herein mentioned, and they did not at any time or at all in any way attempt to give any notice of their rights in the Hillside group of mines to any of the plaintiffs or purchasers of stock of the Seven Stars Gold Mining Company except as such notice might be imputed to the said plaintiffs and stock purchasers through and by virtue of the recorded title in said defendants, of the property in controversy, as in finding one herein set out." (Finding, 38; Trans., 322.)

The point will be made that all persons in the United States and England relying upon the prospectus and purchasing stock could not in law be deceived by its representations because they were charged with *constructive notice* of the records of Yavapai County, Arizona. It was argued in the court below that the record of this title excused the silence, inaction, acquiescence, assistance and receipt of benefits of Lawler and Wells. We there insisted and now insist that there is no authority which sustains this contention. The leading case is *Sumner* v. *Seaton*, 47 N. J. Eq., 103 (19 Atl.), a case which so ably disposes of this contention of counsel for appellee that we beg to quote it at some length in lieu of any discussion of our own.

In *Sumner* v. *Seaton*, 47 N. J. Eq., 103, held:

> "But counsel for the defendant insisted that both Mrs. Smith and complainant are chargeable with notice of the record title of defendant, and argued that they had no right, in the face of it, to suppose that they had title. * * * Courts of equity have in many cases, given parties the benefit of an honest supposition as to title where the slightest examination of the record or other equally available source

of information would have disclosed their error. In fact, to exclude the application of the maxim from cases where the party has implied or constructive notice of title from the record, would confine its application to a very narrow field. * * * Chancellor Zabriskie, in *Dellett* v. *Kemble*, 8 C. E. Gr., 58, held a party entitled to equitable aid against a judgment creditor of his grantor, where the judgment creditor had stood by and, without notice, permitted the former to build on the property in the honest belief that it was free from incumbrance, when he could have discovered the judgment by a search. In *Town* v. *Needham and Harvey*, 3 Paige, 545, the title of Harvey, one of the defendants, to an undivided one-fourth of the premises at the death of his grandmother, clearly appeared by the will of the former owner, which was a part of complainant's chain of title, but he was granted relief against Harvey, on the ground that he bought and made improvements in the honest supposition that the other tenants in common, through whom he derived title, had in some way acquired and were the owners of the whole title. So in *Brown* v. *Bowen*, 30 N. Y., 519, the title, which was barred by estoppel, was found on the public record. In *Storrs* v. *Barker*, 6 Johns., 166, the plaintiff claimed under the devise of a married woman to her husband, and was chargeable with the knowledge that it was void; and it was held that he was justified in supposing that the title had been validated by some action between the devisee and the heir at law, and the heir at law, having stood by and encouraged the purchase by plaintiff from the devisee, was held estopped. In *Chapman* v. *Chapman & Gansamer*, 59 Pa. St., 214, where the plaintiff held under a long lease, and the defendants held in severalty parcels of the whole tract under subsequent conveyances from the same original owner, and plaintiff was held estopped from setting up his lease by his positive encouragement as to defendant Chapman, and his mere silence as to defendant Gansamer, I infer that plaintiff's lease was a matter of record, since, if not recorded,

defendants could have pleaded that they were *bona fide* purchasers for value without notice and need not have relied upon the estoppel. The position, that, in general record notice of the title is sufficient to defeat the estoppel where it rests on *mere silence*, receives qualified support from Prof. Pomeroy in his treatise on Equity, Sec. 810; and also from Mr. Bigelow, in his last edition of his treatise on estoppel, p. 594. I have examined *the case cited by these authors in support of the text, and they are all distinguishable from the case in hand. They each lack one of its important features, viz.: that the person sought to be estopped by his silence knew, or had reason to suppose, that the person asking the protection of the estoppel was acting in good faith on an erroneous supposition as to the title.*"

The court then cites from opinion of Strong, J., in *Hill* v. *Epley*, 31 Pa. St., 331, as follows:

"It seems also to be well established that silence in some cases will estop a party against speaking afterwards. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterwards be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But silence without such knowledge works no estoppel. It is only when silence becomes a fraud that it postpones. * * * Clearly, if David Witherow (the plaintiff's grantor and one of the tenants in common) had not attended the sheriff's sale, nothing would have been required of him after he had his deed upon record. This is conceded. But if it be admitted that his presence at the sale imposed upon him the duty of giving other notice than that which his recorded deed furnished, and which was consequently known to Epley, it must be because he saw that the purchaser was still acting under an erroneous belief that the whole title was somehow in Samuel (the other tenant in common

> and defendant in the execution). Nothing else could make his silence work a fraud. But how could he see that? And how is such knowledge affirmatively brought home to him? There is no evidence of any such erroneous belief. The land was being sold as the land of Samuel Witherow, it is true. But Samuel had an interest in the land. Neither the execution, nor the sheriff, nor the crier, asserted that that interest amounted to the entire fee simple. * * * It is impossible under such circumstances, to see how David's silence could be construed into an admission that Samuel owned the whole, because there was no assertion by the writ, by the sheriff, or by any one, that he did. * * * If the sheriff had offered for sale a tract of land belonging to David in severalty, in which Samuel had no interest, the consequences of silence might have been different."

After quoting the above, the learned New Jersey chancellor continued:

> "I believe this to be a correct statement of the doctrine, and I conceive that it fully disposes of the attempt to avoid the effect of the silence in this case by an appeal to the record title. *The question is not so much what the party setting up the estoppel might or ought to have known or supposed as what he actually did know and suppose to the knowledge of the other party.*"

Lawler and Wells must have known that the parties here claiming the estoppel knew nothing about the mines and their owners except what the prospectus and map represented. They well knew that the maps and prospectuses were going about the country and that multitudes of people, relying implicitly upon their representations, were investing in the stock and the property which it represented. They knew that such persons were ignorant of Lawler and Wells, or of any title, interest or contract held by them, and that such persons were equally

ignorant of the recorded title of Lawler and Wells. If while they knew that such purchasers were being thus deceived as to the title, and while they were participating and contributing and deferring payments and receiving benefits, as here shown, they intended to rely upon their record title for defense, then this very reliance upon that record title in the presence of all these facts intensifies the dishonesty of their conduct.

Another stronger case is *Markham* v. *O'Connor*, 52 Georgia Rep., page 183, the court says:

> "The legal question in the charge resolves itself into this: Is a mortgagee who has his mortgage duly recorded, if he stand by at a public sale of the property, hear a public announcement that the purchaser will get an unincumbered title, and say nothing, estopped from setting up his mortgage against one who buys at such sale, and pays his money under the impression that he is getting a good and unincumbered title. * * * Was it Mr. Markham's legal or equitable duty to have spoken, under the circumstances and announcements put by the judge, and as detailed by at least some of the witnesses? Was it contrary to good conscience, supposing it was then his intent to insist upon his mortgage, to keep silence? Had he a right to consider that he had done enough when he had put his mortgage upon record? * * * Why should the fact that his interest in the premises is as a mortgagee and not as owner make any difference? I take it that the authorities, though it must be admitted that they are not in harmony, may in the main be harmonized, if we consider the principle on which the doctrine is based. They all go on the idea that it is a man's equitable duty to interfere by the assertion of his right when he sees some one about to act upon the truth of a denial of that right. * * * The true doctrine was put in the charge as given. Markham, under the circumstances as supposed, would be estopped, *not because* he was guilty of an intended fraud at the time of the act, *but because* it would be

a fraud, if, acting as he did, he should now have the benefit of the mortgage, assuming that the announcement was made, as some of the witnesses say, that the property was sold clear and free from incumbrances. We think it was Mr. Markham's duty, if he intended to insist on his mortgage, to let the truth be known, either at the bidding, or to notify the purchaser before the title was made, or the notes given, or money paid. If he failed to do any of these things, we do not say that he was guilty of a fraud in not doing so. But the law, in our judgment, is that if he failed, as stated, it would be a fraud to set up his mortgage now; that he is estopped; that the law holds him to the implied admission he then made, either that his mortgage was settled, or that there was some arrangement between him and Sells by which he would get his money out of the proceeds of the sale. He may have intended no wrong at the time. It is the setting up of his mortgage now that is wrong."

To the same effect, see *Carr* v. *Wallace*, 7 Watts, 394.
Krugman v. *Graham*, 51 Wis., 232.
Keyes v. *People*, 197 Ill., 638.

Under these authorities we insist that the records in Yavapai County, Arizona, are no excuse for the conduct of Lawler and Wells. Aside, however, from the authorities, it would be announcing a dangerous doctrine to hold that parties might permit the fraudulent promotion of their property in this way and actively assist in the prosecution of the scheme and enjoy the benefits flowing from the deception, and then escape from all liability for such conduct by appealing to the doctrine of constructive notice.

The form of the relief in case the estoppel is adjudged.

Appellants pray in their amended complaint:

"That this Honorable Court, upon the final hearing hereof, decree that the defendants Lawler and Wells have by their conduct estopped themselves and they are now estopped as against the plaintiffs and others in like estate from asserting that the Seven Stars Gold Mining Company is not the owner of the mines and mining properties described on the prospectus and pictures upon the said map, and ordering, adjudging and decreeing that the full title to the said mines and mining property, and the improvements thereon, and the personal estate therewith connected, and every part thereof is in the Seven Stars Gold Mining Company, to be held by the said mining company under such decree for the benefit and in the interest of its *bona fide* stockholders, plaintiffs and others in like estate," and for accounting, damages, etc.

We contend that this prayer presents a proper form for a decree proceeding upon estoppel. We have the authority of this Honorable Court directly in point.

Jones v. *Bolles*, 9 Wall., 364.

There, as we have seen, the Circuit Court entered a decree compelling the holder of the legal title to relinquish the same to the company and enjoining its subsequent assertion. That decree was affirmed by this Honorable Court.

Aside from this case it is established by abundance of authority that a court of equity may create and decree a title by estoppel and compel conveyance from the party held estopped.

Wade v. *Bunn*, 84 Ill., 117.
Starrs v. *Barker*, 6 Johns. Ch., 166.
Favill v. *Roberts*, 50 N. Y., 227.
Stone v. *Tyree*, 30 W. Va., 701.
Kirk v. *Hamilton*, 102 U. S., 68.

In this case the conveyance decreed must necessarily go to the corporate fiction, the Seven Stars Gold Mining Company. It was represented to be in the company. The plaintiffs believed the title was there when they purchased. The estoppel goes to the extent of the representation. Lawler and Wells must make the appearance and representation of ownership in the company good. Such a decree as prayed in the amended complaint would inure solely to the benefit of the *bona fide* stockholders. The title would then stand in the name of the company, and the property would be dealt with by the court entering the decree in the interest of the persons entitled to the estoppel.

There can no longer be any question that estoppel by conduct is a sufficient ground for affirmative relief.

Jones v. *Bolles, supra.*
Starrs v. *Barker, supra.*
Drexel v. *Berney,* 122 U. S., 241.
Morgan v. *R. R. Co.,* 96 U. S., 716.
Wood v. *Seely,* 32 N. Y., 105.

In *Horn* v. *Cole,* 51 New Ham., 287 (12 Am. Rep., 111), the court reviews the cases of estoppel, saying:

> "Relief was given according to the circumstances of the case—sometimes by enjoining suits at law, in which the legal title was set up, and sometimes by decreeing conveyances and the cancelling of deeds and other instruments; but in all these cases relief was given in equity contrary to the strict legal rights of the defendants."

The extent of the estoppel is discussed in *Grisslar* v. *Powers,* 81 N. Y., 57. Held:

> "As a general rule the estoppel created by a false representation acted upon, is commensurate with the thing represented, and operates to put the party

entitled to the benefit of the estoppel in the same position as if the thing represented was true."

In *Trustees, etc.* v. *Smith*, 118 N. Y., 634, the court say:

"When so applied it (estoppel) is as effectual as a deed would be from the party estopped."

Upon these authorities we respectfully ask that this Honorable Court reverse the decree herein and remand the same with instructions to enter a decree in accordance with the first prayer of the amended complaint. (Trans., 191.)

II.

UPON THE FINDINGS OF FACT OF THE SUPREME COURT OF ARIZONA IN THIS CAUSE, APPELLANTS, FOR THEMSELVES AND OTHERS IN LIKE ESTATE, ARE ENTITLED TO A MONEY DECREE AGAINST LAWLER AND WELLS FOR $112,339.96 PAID THEM BY THE INDUSTRIAL MINING & GUARANTY COMPANY AS THE AGENT OF THE SEVEN STARS GOLD MINING COMPANY, AND THE $47,812.25 RECEIVED BY LAWLER AND WELLS FROM THE SEVEN STARS GOLD MINING COMPANY AS THE GROSS PROCEEDS OF THE OPERATION OF THE MINES IN CONTROVERSY PRODUCED BY AND AT THE SOLE EXPESE OF THE SEVEN STARS GOLD MINING COMPANY.

The figures in this proposition are taken from the findings of the Supreme Court of Arizona. The Industrial Mining & Guaranty Company, between November 12, 1892, and August 4, 1893, paid to Lawler and Wells, on account of the Cowland contract in escrow, $112,339.96. (Finding 47, Trans., 324, 325.) That sum was paid direct to Lawler and Wells. Besides that amount Lawler

and Wells received $47,812.25 as the gross proceeds of the operation of the mines by the Seven Stars Gold Mining Company. (Finding 46, Trans., 324.) That amount, namely, $47,812.25, was earned at the mines while the Industrial Mining & Guaranty Company, as the agent of the Seven Stars Gold Mining Company, was defraying the entire expense of such operation. (Finding 57, Trans., 326.) The Seven Stars Gold Mining Company operated the property from October 1, 1892 (Finding 13, Trans., 318), to about August 17, 1893. (Finding 30, Trans., 321.)

It is found by the Supreme Court of Arizona that remittances to the Bank of Arizona on account of the Industrial Mining & Guaranty Company after November 1st were placed to the credit of the Seven Stars Gold Mining Company. (Find. 30, Trans., 321.)

We contend that upon the facts of this case Lawler and Wells have no right to retain, as against appellants and others in like estate, the aforesaid sums of $112,339.96 and $47,812.25. (Finding 30, Trans., 321.) We so contend, because said sums of money were obtained by fraud from appellants and others in like estate, and that in the hands of the Industrial Mining & Guaranty Company, as the agent of the Seven Stars Gold Mining Company, they were impressed with a constructive trust arising out of such fraud, and that impressed by such constructive trust they were received by Lawler and Wells with either actual or constructive notice. As to the $112,339.96 paid directly to Lawler and Wells on the concealed Cowland contract out of moneys taken from the public by the fraudulent prospectus, and as to the $47,812.25 derived from the operation of the property at the expense of the Seven Stars Gold Mining Company, the case is equally clear.

It will be observed that it is unnecessary, in order to sustain this contention for a money decree, to hold that the prospectus and map represented title in the Seven Stars Gold Mining Company. It is sufficient to find that such prospectus and map contained false representations, and that by such false representations appellants and others in like estate were induced to pay to the Industrial Mining & Guaranty Company, as the agent of the Seven Stars Gold Mining Company, the proceeds of the sale of stock, $253,128.05. (Finding 54, Trans., 54.) That both the English and American prospectuses misstate and conceal material facts has been shown.

It is a well settled principle of equity that property or money obtained by fraud will be impressed with a constructive trust in the hands of the defrauding party or in the hands of any one receiving such money or property with actual or constructive notice of the means by which the money or property had been obtained.

See authorities in Brief, under 16, *supra.*

Equity will follow and compel the return of funds obtained by fraud from any person who does not receive them without notice, in due course of business and for a valuable consideration.

In *Insurance Company* v. *Insurance Company,* 2 C. C. A., p. 541, decided by the Circuit Court of Appeals of the Seventh Circuit, a fraud was committed and the defendant received the benefit of it. The court said:

> "The moneys thus received and applied by Dimick to pay the defendant's losses were received by the defendant as completely, for all practical purposes, as they would have been if he had transmitted them to the defendant, and the defendant had paid them over to the assured in settlement of the loss. (*Pratt* v. *Foote,* 9 N. Y., 463.) The law looks at

the substance of the transaction, and is quite unconcerned about its form. * * * The case is one for the application of the rule that *he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was ignorant of it.* The doctrine is elementary and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself."

In *Morrow Shoe Mfg. Co.* v. *New England Shoe Co.*, 57 Fed. Rep., 685, it is said:

"Whether these parties were guilty of actual participation in the fraudulent scheme of Davis or not, they certainly did deal in the goods obtained by fraud recklessly, and with guilty knowledge, or, which is the same thing, with knowledge of such facts and circumstances as would have put prudent and cautious men on inquiry.

* * * The cardinal principle in all such cases is that the property obtained by fraud shall not be placed beyond the reach of the party defrauded, either by the fraudulent vendee or others chargeable with the knowledge of the fraud. To permit it would be to allow the party to profit by his fraud."

See Story, Secs. 1265, 1266.

Perry on Trusts, Vol. 1, Sec. 172, quoting from *Hortopp* v. *Hortopp*, 21 Beav., 259, says:

"'That where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning.'"

It might be true if Lawler and Wells were perfectly innocent of participation in the fraud upon appellants, and received the moneys which appellants had paid for the stock wholly without any notice, actual or constructive, of the means by which such moneys had been obtained, they could hold the money as against the appellants. Positive and definite information is, however, unnecessary. It is sufficient if they had constructive notice of that fact, and the question as to whether or not upon a state of conceded facts a party will be charged with notice is a question of law.

In *Claflin* v. *Lenheim*, 66 N. Y., 306, the court said:

> "Whether these circumstances were sufficient to put the plaintiffs on inquiry, or in other words, whether they amounted to constructive notice of the fact which an inquiry would have disclosed, viz., the revocation of the agency, was a question of law, to be determined by the court, and it was error to submit it to the jury. (*Am. Linen Thread Co.* v. *Wortendyke*, 24 N. Y., 550; *Howe* v. *Thayer*, 17 Pick., 91.)
>
> Constructive notice is a legal inference from established facts, and when the facts are not controverted the question is one for the court. Whether, under a conceded state of facts, the law will impute notice, is not a question for the jury. (*Birdsall* v. *Russell*, 29 N. Y., 220, 249.)"

In *Vandoren* v. *Robinson*, 16 N. J. Eq., 261, the court said:

> "It avails nothing that the defendants deny actual notice. Constructive notice is knowledge imputed on the presumption, too strong to be rebutted, that the knowledge must have been communicated. 1 Story Eq. Juris., Sec. 399; 2 Sugden on Vendors, 1,041, Sec. 7."

See also

Rhodes v. *Outcalt*, 48 Mo., 370.
Jordan v. *Pollock*, 14 Geo., 156.

The great principle of equity is that no man shall derive profit from a fraud, and wherever a party receives money or property out of which another has been defrauded and claims the right to hold it because it was received for a valuable consideration and without notice, total absence of knowledge and of those facts which raise the implication of notice must clearly and positively appear.

Perry on Trusts, Vol. 1; Sec. 219, and cases cited.

While the Supreme Court of Arizona at one place in its findings finds that Lawler and Wells had no actual notice of the source of the moneys paid them until the commencement of this action, and at another place in its findings finds that on May 20, 1893, nearly a year before the commencement of this action, they received notice in writing that moneys being paid them were derived from the sale of stock, nevertheless, the conclusion of that court does not control. This court will look at all of the facts found, and decide for itself whether or not it will charge notice upon Lawler and Wells. A brief summary of these facts incontrovertibly leads to the conclusion that Lawler and Wells are chargeable with notice.

The knowledge that Lawler and Wells received on May 12, 1892, that Warner intended to incorporate a company to eventually take title to the mines, the long period which they gave him within which to make payments, the presence of Lawler for five days in the office of the Industrial Mining & Guaranty Company while the prospectus was in course of preparation, the knowledge which Lawler then gained of the prospectus, the fact that they must have known that a prospectus was intended to sell stock, their knowledge of its wide dis-

tribution and circulation, the two extensions which they granted to Warner after having such knowledge, the way in which their money was being, from time to time, remitted, in various amounts, but not in the fixed amounts provided in the contract of escrow, thus showing it was being derived from some uncertain source, the negotiations which preceded both extensions, the receipt by Lawler and Wells of $50,000 of guaranteed stock, Lawler's management for over three months of the affairs of the Seven Stars Gold Mining Company at the mines, the express notice in writing, on May 20, 1893, that moneys paid were being derived from the sale of stock, the express notice to Lawler that persons were being induced to buy stock by the representations as to the value of the Hillside mines, the fact that the heavy payments were made to Lawler and Wells during the time they knew the prospectus and map were in process of circulation, the fact that all remittances to Lawler and Wells were placed to the credit of the Seven Stars Gold Mining Company, the fact that that company had no source of income other than the sale of stock, if these and other facts established by this record fall short of actual notice and knowledge, so far as its ever possible for a party to prove actual knowledge of his adversary, then we respectfully submit that they are such an array of facts and circumstances as justify beyond doubt the rule of implied or constructive notice.

In *Whitbred* v. *Boulnois*, 1 You. & Coll. Ex. R., 303, Baron ALDERSON laid down the rule as follows:

> "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of

> those facts, which, if he has used such ordinary diligence, he would readily have ascertained."

There is no pretense in this case that Warner made any effort to conceal from Lawler and Wells any of his acts here shown. Everything done in perpetrating the fraud was open, overt, public. The truth as to the title alone was hidden and concealed.

In *Hodges* v. *Coleman*, 76 Ala., 116, the rule is stated:

> "That notice of facts sufficient to put one on inquiry is the equivalent of the notice of the fraud itself."

The presumption of notice is conclusive, and the party will not be allowed to say that he had no actual knowledge. His knowledge of the circumstances being sufficient to make it his duty to inquire and to render any inaction on his part unconscientious. His failure to pursue the path of duty is no excuse or defense.

Baltimore v. *Whitington*, 78 Md., 231.
Sickles v. *White*, 66 Texas, 178.
Plumb v. *Fluitt*, 2 Anstr., 432.
Hewitt v. *Loosemore*, 9 Hare's Ch. Reps., 455.

In *Hewitt* v. *Loosemore, supra*, the Vice-Chancellor said:

> "Constructive notice is knowledge which the court imputes to a party upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated."

See also,

Kennedy v. *Green*, 3 Myl. & K., 699, at page 719.
Garrard v. *Ry. Co.*, 29 Pa. St., 154.
Vandoren v. *Robinson*, 16 N. J. Eq., 261.

Constructive notice arises from circumstances as would lead a reasonably cautious man to investigate.

Perry on Trusts, Vol. 1, Sec. 223, Note B.
First National Bank v. *Bank*, 156 N. Y., 459.
Story on Equity Juris., Sec. 400.
Condit v. *Maxwell*, 142 Mo., 266.

We contend that the facts found upon this record establish actual knowledge and notice of Lawler and Wells as to the manner in which the funds received by them were raised. But in the absence of actual knowledge and notice, the justice of the application of the doctrine of implied or constructive notice to the facts in the case at bar is manifest.

The facts found are that the Industrial Mining & Guaranty Company was the agent of the Seven Stars Gold Mining Company to sell the stock, and the Industrial Company, as such agent, received from stock purchases all moneys which were paid on account of the purchase price of such stock. (Finding 40, Trans., 323.) These moneys were deposited in the general bank account of the Industrial Mining & Guaranty Company. (Finding 49, Trans., 325.) Then the Industrial Mining & Guaranty Company drew a check for each payment on its own fund and it was sent to the Bank of Arizona and then placed to the credit of Lawler and Wells on account of the purchase price of the property. (Finding 48, Trans., 325.) As these payments were received and turned over to Lawler and Wells the amounts were placed to the credit of the Seven Stars Gold Mining Company. (Finding 30, Trans., 321.) It was one distinct and clearly defined transaction.

It will thus be seen that it is the common case of an agent receiving moneys of his principal, depositing them

in his own bank account with other funds, and then drawing checks thereon for payments on account of a supposed indebtedness of the principal. It has the same effect for all practical purposes as if the identical moneys had been transmitted to Lawler and Wells. The moneys flowed from appellants and others in like estate through the Industrial Company to Lawler and Wells.

Continental Ins. Co. of New York v. *Ins. Co. of Pa.*, 2 C. C. A., 541.

By the deposit of the funds in the general bank account of the Industrial Company their identity was not destroyed.

See authorities in Brief, Point 16 (e).

It will be presumed that the intention was to draw out the funds belonging to the Seven Stars Gold Mining Company.

Knatchball v. *Hallett*, Law Reps., 13 Ch. Div., 696.

Moyers v. *Cummings*, 17 App. Cases (Dis. of Columbia), 269.

Smith v. *Combs*, 49 N. J. Eq., 420.

Woodhouse v. *Crandall*, 197 Ill., 104.

The following extract from the opinion of his Honor, Judge Truesdale, is clearly sound:

> "That some time prior to the 28th day of October, 1892, Cowland and Warner, as a result of previous negotiations between them and the said Lawler and Wells, secured from the latter an extension of the time for the payments required under said contract of May 12, 1892, and at or about that time said Wells and said Lawler were informed and had actual notice that said Warner, or said Cowland, or both of them, were either unable or had no desire or intention of making any further payments on the said contract of May 12, 1892, and were either obliged

or intended to look to the receipts from the sale of stock in this corporation and from ore and bullion to make the future payments; and I find as a fact, that all payments to, and received by, Lawler and Wells from the time these negotiations which lead up to the extension agreement of October 28, 1892, were received by them with actual knowledge and notice of Warner's and Cowland's intentions, *and that all such payments were received by them with constructive notice that they were derived from the sale of the stock of the Seven Stars Company, and that all additions and improvements made on these properties and all expenses incurred in the production of ore and bullion therefrom were paid from funds received from a similar source.*"

It will be perceived that the entry of the money decree here prayed will work no injury or injustice to Lawler and Wells. On the contrary, after satisfying such a decree they will remain greatly enriched by the transactions shown upon this record. Warner paid them $51,000.00 upon the Cowland contract, which they will still retain. (Stipulation, Trans., 105.) More than this, they have had the use of the rest of the money for over five years. They will retain the property and the additional machinery and the improvements placed upon it, and for that portion of the money which they will be decreed to relinquish they paid absolutely nothing. They have parted with nothing of value which creates an equity in their favor for the retention of the money of these appellants.

III.

If this Honorable Court reverses the decree in this cause with instructions that a decree be entered adjudging title to the mining property in controversy in the Seven Stars Gold Mining Company for the benefit of appellants and others in like estate, or a lien thereon to the extent of the moneys received by Lawler and Wells from the sale of stock and the operation of the property by the Seven Stars Gold Mining Company, we submit that such instructions for a decree should further provide that Lawler and Wells account for all ores, bullion, or other property taken by them out of or from the mining property since the commencement of this suit.

Respectfully submitted.

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